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In The

Supreme Court of the United States

October Term, 1985

SEYMOUR WEXLER and DAISY WEXLER, individually and on behalf of their child, DOUGLAS WEXLER,

Petitioners,

vs.

WESTFIELD BOARD OF EDUCATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Where the Court of Appeals had correctly concluded in a previously reported decision that New Jersey imposes a higher standard of education of handicapped pupils than the floor mandated by federal law, could it refuse to apply that higher standard on the appeal of this case?

II. Where the federal court action under 20 U.S.C. § 1415(e)(2) was one stage in the proceedings initiated by the parents over ten years earlier to challenge the school district's proposal to reclassify their son as mentally retarded and place him in a class for mentally retarded children, should the procedural and substantive decisions be based upon the laws and regulations operative in 1972 or those operative at the time of the subsequent court decisions?

III. Are parents who maintain their child in the educational placement approved and funded by the school district entitled to reimbursement of the tuition costs incurred during their challenge to the district's subsequent proposal to change the placement and classification?

IV. In a trial under 20 U.S.C. § 1415(e)(2), is the court required to make independent findings of fact and conclusions of law based upon a *de novo* assessment of all the evidence and the higher standards imposed by state law?

V. Does the issuance of a diploma terminate the handicapped pupil's right to a free appropriate public education to age 21 where the IEP mandates an annual review and specifies the need for continuation of the special education services until age 21?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review and reverse a judgment of the United States Court of Appeals for the Third Circuit entered on February 19, 1986, and an order of March 18, 1986, denying a petition for rehearing.

OPINIONS BELOW

The following opinions are reprinted in the appendix. They are unreported unless otherwise noted:

1. Decision of the Appellate Division of the Superior Court of New Jersey, rendered December 22, 1977.

2. Decision of the Appellate Division of the Superior Court of New Jersey, rendered March 4, 1983.

3. Decision of the Office of Administrative Law, State of New Jersey, rendered June 9, 1983.

4. Memorandum Opinion of the United States District Court for the District of New Jersey, dated November 27, 1984.

5. Opinion of the United States Court of Appeals for the Third Circuit, filed February 19, 1986, and reported at 784 F. 2d 176 (3rd Cir. 1986).

6. Order of the United States Court of Appeals for the Third Circuit, dated March 18, 1986.

7. Judgment of the United States Court of Appeals for the Third Circuit, entered February 19, 1986, and issued on March 26, 1986.

STATEMENT OF JURISDICTION

On February 19, 1986, the United States Court of Appeals for the Third Circuit entered judgment affirming a judgment of the United States District Court for the District of New Jersey. Petitioners filed a petition for rehearing on March 3, 1986. On March 18, 1986, the petition for rehearing was denied. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following are found in the appendix:

United States Statutes: 20 U.S.C. § 1401(16) through (19), 20 U.S.C. § 1412(1)(6), 20 U.S.C. § 1415.

STATEMENT OF THE CASE

Douglas Wexler, born on February 18, 1963, has resided in Westfield since shortly after his birth. In 1968, Westfield's Child Study Team classified him as "communication disordered" and "perceptually impaired" and placed him in the Midland School, an approved private school in North Branch, New Jersey. Westfield paid his tuition and provided daily transportation. Continuation of the placement was approved annually for the 1968-69 through 1971-72 school years.

The progress reports submitted by Midland School to Westfield, including the report compiled on June 16, 1972, showed Douglas' general progress and cooperative attitude. Nevertheless, Mr. Stadeck, the then head of special education services for Westfield, was determined to change the placement. Even before Westfield's team had reevaluated Douglas, he had directed that Douglas be enrolled at the Millburn School for the Deaf although Douglas was not auditorily impaired. In the summer of 1972, primarily on the basis of the I.Q. test scores reported by the team's psychologist, Westfield's child study team recommended that the classification of Douglas be changed to "mentally retarded—educable" and that he be placed in Westfield's public school class for mentally retarded pupils.

The parents immediately contested the proposed change in classification and placement. They exercised their rights to

challenge the proposed change administratively. They had Douglas retested at Cornell Medical Center in the fall of 1972 and submitted to Westfield the evaluation reports of Cornell's pediatric psychologist, Dr. Lee Salk, and pediatric neurologist, Dr. Gail A. Solomon. Dr. Salk found "Douglas to have *average intelligence* and some central nervous system dysfunction which manifests itself in a *perceptual disorder and a learning disability.*" Dr. Solomon stated that Douglas "has evidence of organic cerebral dysfunction" and "*certainly is not retarded.*" Dr. Solomon stressed that Douglas should not be placed with retarded children but should continue at the Midland School.

The administrative review by the Union County Superintendent of Schools expressed "areas of concern" and ordered Westfield to take further measures. The second neurological evaluation by Dr. Solomon, dated September 30, 1974, expressly found evidence of organic neurological impairment and minimal cerebral dysfunction, but the Westfield team adhered to its initial position.

The parents thereupon, in May 1975, filed a petition with the Commissioner of Education of New Jersey in accordance with the procedures in effect.[1]

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1. The federal court decisions below were part of the ongoing administrative/judicial proceedings which the parents initiated in May 1975. Prior appeals included several reviews by the Appellate Division of the Superior Court of New Jersey and one by the Supreme Court of New Jersey reported at 91 N.J. 234 (1982) *sub nom. "S.W." and "D.W." v. Westfield Bd. of Education.* Those appeals to the New Jersey appellate courts culminated in a decision entered by the Appellate Division on March 4, 1983 (18a), vacating the decisions of the Commissioner of Education and New Jersey State Board of Education because the form of due process required by the federal act (EHA) had not taken place. This matter was remanded for the purpose of providing an impartial due process hearing consistent with the federal act, the federal decisions and the opinion of the Appellate Division.

During the summer of 1975, the parents were notified that Westfield planned to establish a public school class for students with special learning disabilities or neurological impairments in which Douglas could be placed. Unfortunately, the class was not established.

Pursuant to the strong recommendation of Westfield's school physician after the filing of the petition, Westfield agreed that an independent neurological evaluation at Westfield's expense be performed by Dr. Avrum Katcher, Director of the Child Evaluation Center at Hunterdon Medical Center. Dr. Katcher reported on November 24, 1975, that the classification of neurologically handicapped would be most appropriate and that *it would be inappropriate to consider Douglas as mentally retarded for education purposes.*

Another independent neurological evaluation of Douglas was performed by Dr. Martha Bridge Denckla at Westfield's expense on December 30, 1980, as part of a complete evaluation conducted by Westfield during the 1980-81 school year.[2] Dr. Denckla described Douglas as a "well-treated neurologically-impaired youngster" who "does not fit with the concept of the mentally deficient."[3] That evaluation resulted in Douglas' classification by Westfield as "neurologically or perceptually impaired: perceptually impaired" and his placement at Maplebrook School

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2. Westfield had not undertaken any earlier revaluation of Douglas notwithstanding the fact that New Jersey law required that all handicapped pupils *residing* in the school district be evaluated and not merely those handicapped pupils *enrolled* in the district's schools.

3. Before accepting her current positions at the National Institute of Health and at Johns Hopkins University School of Medicine, Dr. Denckla had spent eight years of her professional life in New Jersey as a neurologist working with handicapped children. She was unable to testify at the trials below because of her government commitments.

with Westfield paying the tuition costs and a portion of the residential costs.[4]

Contending that the issuance of a diploma in June 1982 terminated Westfield's responsibility for Douglas' education even though he had not attained age 21, Westfield refused to offer any further education services. Consequently, the continuation of Douglas' studies and training at the Summit Collegiate Studies Center during the 1982-83 and 1983-84 years was at his parents' expense.

The tuition and related education expenses advanced or incurred by his parents for Douglas' attendance at the Midland School for the school years 1972-73 through 1977-78 amounted to $22,090. The tuition and related education expenses for Douglas' attendance at the Maplebrook School, also a New Jersey approved school for handicapped students, during the school years 1978-1979 through 1980-81 amounted to $31,272. The transportation costs for the school years 1972-73 through 1980-81 amounted to $29,925. The reimbursement sought for those years, including interest but excluding legal expenses, totaled about $105,000 as of April 30, 1983.

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4. The 1981 individualized education plan (IEP) included a provision for annual review of Douglas' program and placement. Westfield never implemented this provision.

REASONS FOR GRANTING THE WRIT

I.

CONTRARY TO ITS PRIOR RULINGS IN *GEIS* AND THIS COURT'S DECISION IN *TOWN OF BURLINGTON*, THE COURT OF APPEALS ERRONEOUSLY REFUSED TO APPLY THE HIGHER NEW JERSEY STANDARD OF EDUCATIONAL OPPORTUNITY FOR HANDICAPPED PUPILS.

Instead of considering whether Westfield's proposals for classification, placement and program met the higher New Jersey standards of assuring Douglas "*the fullest possible opportunity to develop [his] intellectual capacities*" and enabling him to "*best achieve success in learning,*" the Court of Appeals applied the "basic floor" standard of *Rowley*,[5] namely, that the school board's actions merely be "reasonably calculated to enable the child to receive *educational benefits.*" In doing so, the Court of Appeals erroneously refused to apply its own recent decision in *Geis v. Board of Education of Parsippany-Troy Hills*, 774 F. 2d 575, 579-81 (3rd Cir. 1985), filed on September 30, 1985.

Geis had affirmed the ruling of District Judge Dickinson R. Debevoise that the New Jersey regulations "created a higher standard for the education of handicapped children than the basic opportunity required in order to receive federal funding." Judge Debevoise had found by a preponderance of the evidence that the private school preferred by the parents would allow the child to "*best achieve success in learning*" and that placing the child "in his home and in local schools would have an adverse effect on his ability to learn and develop *to the maximum possible extent.*" 589 F. Supp. at 272-273 and 774 F. 2d at 579-81.

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5. *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 200-01 (1982).

Geis rejected the school district's contention that enforcement of a state-mandated standard of educational opportunity that is more demanding than the basic floor of opportunity required by the federal act violates the Eleventh Amendment by, in effect, ordering the states to comply with state laws. In a careful and scholarly consideration of that question, the Court of Appeals held that any *Pennhurst II*[6] problem is obviated by the fact that the state standard is incorporated into federal law.

As *Geis* stated (774 F. 2d at 581):

> We think it very unlikely that Congress, in granting state and federal courts concurrent jurisdiction to enforce the Act, 20 U.S.C. Sec. 1415(e)(2), *envisioned that the standard of educational opportunity to be applied would depend upon the forum.* If that were the case, school districts could easily evade higher state standards by the expedient of removing cases to federal court. (Emphasis added.)

Citing the recent decisions of the Ninth Circuit in *Students of California School for the Blind v. Honig,* 736 F. 2d 338 (9th Cir. 1984), *vacated on other grounds,* ____ U.S. ____, 105 S. Ct. 1820 (1985) and of the First Circuit in *Town of Burlington v. Department of Education,* 736 F. 2d 773, 788-89 (1st Cir. 1984), *aff'd,* ____ U.S. ____, 105 S. Ct. 1996 (1985), the Third Circuit noted that a "free appropriate public education" is defined under the act as special education and related services that, *inter alia,* "meet the standards of the state educational agency." 20 U.S.C. § 1401(18)(B). The Third Circuit properly concluded in *Geis* that New Jersey *did* impose a higher standard of education than

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6. *Pennhurst State School & Hospital v. Halderman,* 469 U.S. 89, 104 S. Ct. 900 (1984).

the floor mandated by the federal act. Nevertheless, in ruling on the Wexler's appeal in this case, the Third Circuit ignored *Geis* and affirmed the district court's use of the inapplicable *Rowley* standard.[7]

Although all the regulations in effect in New Jersey since 1972 when Westfield's proposal for a change in classification and placement first came under administrative consideration contained the "best achieve success" standard,[8] the opinion of the courts below not only omitted *any* mention of the higher standards imposed by the New Jersey statutes and regulations but also disregarded the stipulation of the parties, made part of the record, that:

> 37. Under New Jersey law, each child in the state has the right to an educational program geared to the highest level he is capable of achieving, permitting him to realize his highest potential as a productive member of society.

We respectfully submit that the Court of Appeals erroneously applied the floor standard of *Rowley* rather than the higher New Jersey standard. The error first appears at the end of the Third

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7. The decision of the Third Circuit in *Geis* was filed on September 30, 1985. Copies of the slip opinion were obtained by the Wexlers' attorney on October 29, 1985, submitted to the panel and counsel for Westfield by letter on that day, and referred to at the oral argument on November 4, 1985. Although *Geis* was cited in a footnote to the discussion of the "then current placement" issue, the Court of Appeals completely disregarded *Geis* on the critical issue of whether continuation of Douglas at the Midland School was preferable under the "higher standard" imposed by New Jersey.

8. While the 1984 regulations do not contain that express language, the *statute* still establishes the standard requiring that all handicapped children be "assured *the fullest possible opportunity to develop their intellectual capacities.*" N.J.S.A. 18A:46-19.1.

Circuit's rambling discussion of its "standard of review" from which it concludes (9a, 10a; 784 F. 2d at 182):

> Since *Rowley* requires that the school board's action be "reasonably calculated to enable the child to receive educational benefits," 458 U.S. at 207, it is plain that the district court applied the correct standard of review.

The Third Circuit's opinion notes the parents' contention "that the district employed an improper standard of review" (9a; 784 F. 2d at 181), but it does not meet the contention or acknowledge that *Geis* sustains the parents' position and is wholly at odds with its decision herein.

The error next appears in the Third Circuit's treatment of the parents' contention that Douglas was "improperly classified and placed prior to 1981" (10a; 784 F. 2d at 182). The thrust of the parents' argument was that an independent assessment of the evidence would result in a determination that the parents were justified in insisting that Douglas continue to be educated as a neurologically or perceptually impaired pupil and not as a mentally retarded child. The Third Circuit's familiar response is simply (10a; 784 F. 2d at 182):

> We conclude that Westfield's classification and placement were "reasonably calculated to enable [Douglas] to receive educational benefits." 458 U.S. at 207.

The error appears for the third time in the Third Circuit's conclusion that the diploma issued by Westfield to Douglas in June 1982 terminated Westfield's responsibility for Douglas' education because (13a; 784 F. 2d at 183):

> [Douglas]. . . graduated in accord with his IEP which was "reasonably calculated to enable the child to receive educational benefits," *Hendrik Hudson District Board of Education v. Rowley,* 458 U.S. 176, 207 (1982). . .

In sum, the failure *and* refusal of the Court of Appeals to apply the higher New Jersey standard in accordance with *Geis* deprived Douglas and his parents of the substantive and procedural rights to which they are entitled under federal and state law. *Compare David D. v. Dartmouth School Committee,* 775 F. 2d 411 (1st Cir. 1985), *cert. denied,* April 28, 1986, ____ U.S. ____ (1986), with respect to the higher standard afforded by Massachusetts law.

II.

THE PARENTS WERE NOT ACCORDED THE INDEPENDENT *DE NOVO* ASSESSMENT OF THE EVIDENCE REQUIRED BY 20 U.S.C. § 1415.

The decision of the Court of Appeals also erroneously disregarded the other crucial feature of *Geis,* to wit, that in actions under § 1415(e)(2) the reviewing court must *independently determine* whether the individualized program proposed by the school district meets the *higher* standards mandated by New Jersey law. 774 F. 2d at 583.

The recommendation that Douglas be removed from the Midland School and be placed in a class of mentally retarded students was not based on any determination that the program and facilities of such class would be more appropriate to the "special needs" of Douglas than what was being provided for him at Midland School. On the contrary, the record is replete with evidence that Douglas had made steady progress at the

Midland School, was benefiting from his placement there and was in an appropriate program.

At the "trial" on July 24, 1984, Westfield conceded that Douglas was neurologically impaired and further conceded that the medical evaluations from 1972 on found neurological impairment and damage to the central nervous system. The team's recommendation was based upon two factors: (1) Douglas' scores on his 1972 I.Q. test and (2) the absence of so-called "hard signs" of neurological impairment.

Only the school psychologist described Douglas as mentally retarded. Her 1972 report noted that Douglas had committed a large number of errors on the Bender-Gestalt test. As she observed, many of these errors "were highly significant for a diagnosis of neurological impairment." Her 1974 report also noted the "organic derivation" of Douglas' learning difficulties and rated Douglas' verbal abstractions as "age appropriate."

In contrast, all the other psychological and neurological evaluations concurred in the view that Douglas was not, and is not, mentally retarded.[9] Those evaluations, including the independent evaluations by Dr. Katcher and Dr. Denckla paid for by Westfield, placed Douglas in the normal or average range.

The parents' insistence that Douglas not be relegated to a class for mentally retarded pupils was fully justified and supported by the reports of the experts. Indeed, the 1980 report of Westfield's psychologist acknowledged that Douglas "appears to have made good growth in all areas since the time of the last evaluation."

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9. There was not an iota of evidence showing that Douglas met the requirements for classification of "mentally retarded" established by the New Jersey education rules and regulations promulgated in 1970 or in later revisions.

The report of Dr. Denckla commented on "how beautifully informed he is on personal, social and current events information."

Particularly significant are the following excerpts from Dr. Denckla's report:

> "One must only pause to congratulate both educational, professional, and familial persons who have brought this boy to essentially a really very happy state at this age of 17. . . .he is indeed a good example of a well-treated neurologically-impaired youngster. . ."

Hence the 1972 test scores reported by Westfield's school psychologist were refuted not only by the overwhelming weight of the evidence establishing that Douglas is not mentally retarded but also by her own subsequent determination that Douglas' proper classification is "neurologically or perceptually impaired: perceptually impaired."

The district court judge acknowledged his duty to make "an independent determination of the appropriateness" of the proposed reclassification and placement (57a). Nevertheless, he did not do so. Instead, he simply concluded that Westfield's decision to reclassify Douglas was "*properly founded in the evidence considered by the Westfield . . . team*" (57a). He thereby deprived the parents of their right to a judicial decision based on the preponderance of the evidence in the entire record in complete disregard of § 1415(e)(2) and the prior rulings of the Appellate Division.

The one thing which is apparent from the history of the prior proceedings is that the parents have yet to be accorded the benefit of an *independent determination* based upon a *preponderance* of *all* the evidence.

The initial decisions of the New Jersey State Board of Education and Commissioner of Education were rejected by the Appellate Division in 1977 because they applied the *abuse of discretion* standard and improperly gave a *presumption of correctness* to Westfield's proposal to reclassify Douglas and change his placement (16a, 17a).

The rulings following the first remand were rejected by the Appellate Division in 1983 because they had denied the parents of their due process rights under EHA.[10]

The Appellate Division, however, again refused to render a decision on the merits. Its decision of March 4, 1983, vacated the earlier decisions, declaring (20a):

> We will not, nor can we, therefore persist in the continuation of a process that runs contrary to the clear requirement of the EAHCA. . . The form of due process required by the federal act has not taken place. The decision of the chief classification officer, as well as those of the Commissioner of Education and of the State Board of Education in this pending matter, are contrary to the federal mandate of the act and our duty is clear.

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10. The parents' application for discovery during the pendency of that appeal resulted in the disclosure that neither the tapes nor a transcript of the hearing before the classification officer were considered by the State Board or the Commissioner, despite the fact that the opinions of those agencies affirming the officer's decision were purportedly based upon a *review of the full record.* Also during the pendency of that appeal the Supreme Court of New Jersey permitted the parents to supplement the record before the Appellate Division so as to include therein the 1980-81 evaluations and child study team recommendations. *S.W. v. The Board of Education of the Town of Westfield, Union County,* 91 N.J. 234 (1982).

There followed a remand for an "impartial due process hearing." Although the OAL judge had been furnished with copies of the Appellate Division rulings, he denied relief because the parents had not proved that Westfield's conduct was *arbitrary, capricious or unreasonable.*[11] Needless to say, the parents were shocked and dismayed (27a).

The review and analysis of the record in this case by the district court and Court of Appeals must be contrasted with the careful analysis and independent determinations made by the district court judges in two other recent cases involving the education of handicapped New Jersey pupils, namely, *Geis, supra,* 589 F. Supp. 269, decided May 30, 1984, and *Bonadonna v. Cooperman,* 619 F. Supp. 401 (D.N.J. 1985), decided August 20, 1985, also prior to the Third Circuit's decision in *Geis.* Those judges did not determine merely whether the local school board's actions "reflected bad faith" or were "reasonable in light of the evidence." Rather, each judge made a *de novo* independent determination of what the proper placement should be, based upon the preponderance of the evidence in the record, without according any presumption of correctness to the school board's actions.

As shown above, the prior rulings of New Jersey's Appellate Division sought to provide an impartial hearing and an independent *de novo* determination based on the preponderance of the evidence. Unless this petition for writ of certiorari is granted, the "procedural safeguards" of federal and state laws to ensure a free appropriate education for handicapped pupils will have effectively been denied Douglas and his parents.

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11. The Wexler case was the first and only special education matter decided by the OAL judge. He had no expertise.

III.

THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE ISSUANCE OF A DIPLOMA TO DOUGLAS IN JUNE 1982 TERMINATED WESTFIELD'S RESPONSIBILITY FOR HIS FURTHER EDUCATION.

In recognition of the special education needs of handicapped students, both federal and New Jersey law require that services be provided to age 21. Thus, 20 U.S.C. § 1412(b) and 34 C.F.R. 300.300 mandate that each state shall insure that free appropriate public education is available "to all handicapped children aged three through twenty-one within the state not later than September 1, 1980." The current New Jersey regulations (N.J.A.C. 6:28-1,3) state:

> Educationally handicapped pupils attaining age 21 during the school year shall be provided required services for the balance of the school year.

Douglas did not attain age 21 until February 18, 1984. Consequently, he was entitled to free educational services through the school year ending June 30, 1984. The Court of Appeals erroneously denied his right to such services on the thesis that the diploma issued to Douglas in June 1982 terminated Westfield's responsibility for Douglas' education. The ruling was (a) contrary to the preponderance of the evidence on this issue and (b) contrary to the applicable law.

First, Dr. Denckla's report, which had been accepted by Westfield's school physician and formed the basis for the 1981 IEP concluded:

> . . . it is my sincere hope that his appropriate educational placement will be continued in the future *until he reaches adult status.*

Second, as Dr. Donovan[12] acknowledged, the awarding of a diploma to a handicapped student does not terminate the school district's "obligation for services" unless "the IEP has been completed to *the satisfaction of all parties.*

Third, as Dr. Donovan further acknowledged, he never sought to ascertain whether Douglas' IEP had been completed to the parents' satisfaction. Dr. Donovan did not know whether the specific goals and objections of the IEP had been accomplished.

Fourth, Dr. Wexler had contacted Dr. Donovan about Douglas' need for further education and training after the 1981-82 school year and had sought Dr. Donovan's guidance as to potential placements.

Fifth, Westfield did not conduct the annual review mandated by the IEP for the 1981-82 school year.

In sum, the Court of Appeals should not have found that Douglas was "properly graduated."

The Court of Appeals should not have concluded that the Westfield "diploma" given to Douglas relieved Westfield of its responsibilities under EHA and New Jersey law. The thrust of both EHA and New Jersey law is that a handicapped pupil requires, and must be given, special education services to meet the pupil's unique needs. Those services and needs are beyond those of a non-handicapped pupil. Those services and needs must be expressly addressed in an "individualized education program" (IEP) specifically designed for the handicapped pupil. § 1401(19)(76a). Both EHA and New Jersey law also recognize that the needs of the handicapped pupil usually cannot be met

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12. Dr. Donovan replaced Mr. Stadeck as the head of special services for Westfield in 1975.

during the five to eighteen age span generally provided for non-handicapped pupils. Accordingly, EHA mandates that a handicapped pupil be provided with special educational services through age 21. Section 1412(2)(B) (11a).

The real issue in the instant case is whether a handicapped pupil forfeits his entitlement to further special education by accepting a diploma—despite the fact that his IEP emphasized his need for further years of education and provides for an *annual* review.

Douglas' IEP for the 1981-82 school year set forth the conclusion of Westfield's team that there was a "discrepancy between functional level and expectancy level" of "approximately four or more years" in several academic areas, including reading, spelling, and mathematics. The IEP called for an "annual review" to be conducted by Westfield's team "during the fourth quarter of the academic year."[13] Nowhere does the IEP state that Douglas' right to special education services would terminate in June 1982.

The opinion of the Court of Appeals acknowledges that "neither the ALJ nor the district court discussed section 1412(2)(B)'s requirement of some state responsibility for education of handicapped children between the ages of eighteen and twenty-one." (12a; 784 F. 2d at 183). They simply "assumed" that graduation and issuance of a diploma terminated Westfield's responsibility. (*Ibid.*)

We respectfully submit that the Third Circuit's analysis and ruling on the diploma issue is confusing and incorrect. Contrary to the court's charge (13a; 784 F. 2d 183), the parents do not assert that EHA creates an "absolute duty" to provide a FAPE until age 21. The parents do contend, however, that Douglas'

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13. The annual review was never undertaken.

IEP, read in conjunction with § 1412(2)(B), was never intended to substitute a Westfield diploma for Douglas' rights to further education. The Westfield team expressly noted in the IEP the *four year* discrepancy between Douglas' functional and expectancy levels. The IEP incorporated the neurological evaluation report of Dr. Denckla which stated:

> [Douglas] is correctly placed at the present time, and. . .he deserves to be in a neurologically impaired special education setting until the age of 21 years. . .

The IEP stipulation that Douglas would be given a "standard diploma" from Westfield upon "satisfactory completion of the program for the 1981-82 school year" had a two-fold purpose. First, it was intended to reward Douglas for his outstanding efforts and accomplishments in the face of his handicaps during the first twelve years of his education. Second, it was intended to exercise the option provided by the New Jersey regulations for issuance of the diploma of the local school district where, as here, Douglas had attended a school outside of the local district. N.J.A.C. 6:28-2.6.

The Third Circuit's treatment of the diploma is further flawed by its disregard of the earlier decision of the Court of Appeals in *Geis, supra.* Its statement that Douglas was "properly graduated" rests upon the *Rowley* standard of some "educational benefits" (13a; 784 F. 2d at 183) rather than upon the higher New Jersey standard affirmed in *Geis.* A New Jersey handicapped pupil's right to education services to age 21 are not terminated by issuance of a diploma evidencing receipt of "educational benefits" at a younger age—especially since New Jersey's laws

and regulations entitle that pupil to an individualized program according to how the pupil can "best achieve success in learning."[14]

CONCLUSION

For the reasons given, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

RALPH NEIBART
Attorney for Petitioners

Dated: June 10, 1986

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14. In a case decided on June 22, 1981, the New Jersey Commissioner of Education ruled that a handicapped pupil was entitled to reimbursement for his private school education costs for two years after his "graduation from his local high school district. *In re Pascack Valley Regional School District,* Case No. 274-81, 3 EHLR 503: 103. The Commissioner rejected the district's contention that the awarding of a diploma at the end of the pupil's senior year at the district's high school terminated its responsibility. The Commissioner noted the district had denied due process procedures and, most significantly, failed to provide a free, appropriate and individualized program "according to how the pupil can best achieve success in learning. . ." *citing* N.J.A.C. 6:28-2.1(a)(1). 3 EHLR 503 at 104.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FEBRUARY 19, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5886

SEYMOUR WEXLER and DAISY WEXLER,
individually and on behalf of
their child, DOUGLAS WEXLER,
Appellants

v.

WESTFIELD BOARD OF EDUCATION,
Appellee

Appeal from the United States District Court
for the District of New Jersey
(Civ. 83-2745-L)

Argued November 4, 1985
Assigned January 6, 1986

Before: SEITZ, WEIS, and ROSENN,
Circuit Judges.
(Opinion filed: February 19, 1986)

Ralph Neibart, Esq.
(argued)
80 Main Street
West Orange, NJ 07052
Attorney for Appellants

Appendix A

William D. Peek
(argued)
Nichols, Thomson, Peek
& Meyers
P.O. Box 2038
Westfield, NJ 07092
Attorney for Appellee

OPINION OF THE COURT

SEITZ, *Circuit Judge.*

The Wexlers appeal the judgment of the district court dismissing their claim for reimbursement of expenses incurred in sending their son, Douglas, to a series of private schools while they contested the Westfield Board of Education's evaluation of their son's handicap and proposed educational placement. They also appeal the denial of attorney's fees incurred in the proceedings challenging those placements. We have jurisdiction under 28 U.S.C. § 1291.

I.

Douglas Wexler was indentified as a handicapped child in 1968 and placed at the Midland School by the Westfield New Jersey Board of Education. In 1972, further tests were conducted by outside experts and Westfield's Child Study Team, the body responsible in the first instance for evaluating handicapped students and recommending and making available "a free appropriate public education" as required by the Education of All Handicapped Children Act (EAHCA), 20 U.S.C. § 1400 *et seq. See* N.J. Stat. Ann.§§ 18A: 46-3, 46-5, 46-5.1 (West 1968 & Supp. 1985); N.J. Admin. Code § 6:28-1.3. As a result of the 1972

evaluation. Douglas was reclassified as mentally-retarded educable, and an Individualized Educational Program (IEP) was developed. The Child Study Team recommended placement in the Intermediate Educable Class at the Tamaques School.

The Wexlers objected to the change in classification and placement. They obtained further medical evaluations at Westfield's expense, and kept Douglas at Midland, paying the tuition themselves.

The ensuing dispute, which eventually resulted in this action, involved frequent retesting and reevaluations by the Child Study Team as well as frequent resort to outside experts by the Wexlers. In 1975, the plaintiffs filed a petition with the Commissioner of Education seeking administrative review of the 1972 reclassification decision. The Wexlers contended that Douglas was not mentally retarded but neurologically impaired and that the Child Study Team's classification and proposed placement were therefore erroneous. The Wexlers never investigated the Tamaques program, however, or compared it to the program at Midland. We will not detail the history of the state proceedings except to note that administrative decisions were several times vacated and the case remanded because the proceedings did not comport with the due process requirements of the EAHCA.

A proper due process hearing was finally held before an administrative law judge, who rendered his decision on June 9, 1983. In the period between the filing of the petition in 1975 and the hearing in 1983, several important events occurred. In 1976, on the basis of further evaluations, the Child Study Team modified its classification to "Multiply Handicapped: Primary--Mentally Retarded-Educable; Secondary--Neurologically Impaired," but did not change its recommended placement.

Appendix A

By 1980, the Wexlers had unilaterally transferred Douglas to the Maplebrook School. On the basis of tests and examinations conducted in late 1980, the Child Study Team reclassified Douglas in February 1981 as "Neurologically or Perceptually Impaired: Perceptually Impaired" and recommended placement at Maplebrook with costs to be assumed by Westfield. An IEP was developed and agreed upon on March 11, 1981, and revised in September, 1981. Pursuant to that IEP, Douglas was graduated from Maplebrook School in the spring of 1982 and received a diploma from the Westfield Public Schools, at which point Westfield contends that its responsibility for Douglas' education terminated. In September 1982, the plaintiffs unilaterally placed Douglas in the Summit Collegiate Studies Center in Jerusalem, Israel.

While the original petition filed with the Commissioner of Education encompassed only the 1972 decision, the Wexlers' claims for reimbursement for tuition, transportation, legal fees, and interest before the ALJ encompassed the entire period between 1972 and the 1981 reclassification, plus the period between Douglas' graduation and the hearing, during which time he was at the school in Jerusalem.

The ALJ upheld the pre-1981 actions of the school board, including its classifications and proposed placements, and found that the Wexlers were not entitled to reimbursement for that period because they had voluntarily chosen not to avail themselves of the "free, appropriate public education" properly made available to them by Westfield. He also found that since the Wexlers had unilaterally enrolled Douglas in the Summit School without objecting to the 1981 IEP, which called for graduating Douglas and issuing him a diploma, they were not entitled to reimbursement for Douglas' post-graduation education. Finally, he found that under New Jersey law, the Wexlers were not entitled to reimbursement of legal fees.

Appendix A

II.

Following the ALJ's decision, the Wexlers filed this action in the United States District Court seeking relief under the EAHCA, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the New Jersey statutes relating to special education, N.J. Stat. Ann. §§ 18A: 46-1 *et seq.* Section 1415 (e)(2) of the EAHCA explicitly grants jurisdiction to the district court over civil actions contesting the findings and decisions made by state administrative agencies with respect to "complaints . . . relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415 (b)(1)(E).

The district court conducted an independent review of the evidence amassed in the state proceedings, held oral arguments and received some new evidence. It accepted and agreed with the ALJ's findings and denied all relief sought by the Wexlers. Based on the record, the district court found that Westfield made available a free appropriate public education for the school years between 1973 and 1981 and that the parents voluntarily refused to avail themselves of the offer. In addition, it found that Douglas was properly graduated and given a diploma from the Westfield Board of Education and that Westfield's responsibility for Douglas' education terminated at that point. The court therefore denied plaintiffs reimbursement for tuition and expenses.

The district court rejected the Wexlers' argument that Douglas' "current placement" in 1972 was the Midland School and that they had a right under section 1415 (e)(3) of the EAHCA to have him remain there until a final disposition of their challenge was made. It found that it was reasonable for Westfield to consider Douglas' then current placement to be the Tamaques

School and to have viewed the Wexler's decision not to investigate or enroll their son in the program offered their son at the Tamaques School as a withdrawal of their son from the Westfield Public School system. Thus, the court found that the plaintiffs were not entitled to reimbursement under the "stay put" provision, *see DeLeon v. Susquehanna Community School District*, 747 F.2d 149, 150 (3d Cir. 1984), of the EAHCA. Finally, the court held that the plaintiffs were not entitled to attorney's fees, since the EAHCA does not provide for attorney's fees, and plaintiffs could in no way be considered prevailng parties under the Civil Rights Act or the Rehabilitation Act.

The Wexlers' appeal to this court may be best categorized as presenting the following grounds for reversal: first, the district court employed an improper standard in reviewing the state administrative proceedings and in making its own determinations. Second, a preponderance of the evidence supports their view that Douglas was improperly classified and placed by Westfield. Third, Douglas' "then current placement" should be considered the Midland School rather than the Tamaques School. Finally, they claim that under the EAHCA Westfield is responsible for Douglas' education until he reaches twenty-one years of age and that Westfield's responsibility therefore did not terminate with Douglas' graduation. The Wexlers claim that the above grounds support their claims for reimbursement; in addition, they challenge the denial of their claims for attorney's fees.[1]

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1. On appeal, plantiffs appear to have abandoned any separate arguments based on section 1983 or section 504 of the Rehabilitation Act, and we decide this case under the EAHCA and cases interpreting it. In any case, under the circumstances of this case, the EAHCA is the exclusive remedy for the injuries claimed. *See Smith v. Robinson*, 104

III.

At the outset, we must address the question of our standard of review. The standard of review of the school board's decisions and the state administrative proceedings by the district court is now well settled. Section 1415 (e)(2) of the EAHCA states that "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

In *Hendrik Hudson District Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982), the Supreme Court interpreted that standard, stating:

> [t]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415 (e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to those proceedings .... [A] court's inquiry in suits

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S.Ct. 3457, 3468-70, 3471-74 (1984); *see also, DeLeon v. Susquehanna Community School District*, 747 F.2d 149, 150 n.1 (3d Cir. 1984). Such a disposition of the non-EAHCA claims also disposes of the claims for attorney's fees, since attorney's fees are not available under the EAHCA. See *Smith v. Robinson*, *supra*.

> brought under § 1415 (e)(2) is twofold. First, has the state complied with the procedures set forth in the Act? And, second, is the individualized educational program reasonably calculated to enable the child to receive educational benefits?

Where, as here, both the standard of review employed by the district court and its decision on the merits are challenged, we think *Rowley* conditions our standard of review as well as the district court's. In analyzing whether the district court applied the correct standard, we determine whether it independently reviewed the record and heard any requested additional evidence as required by the statute. We then determine whether the district court evaluated that evidence in terms of the substantive standards embodied in *Rowley*'s twofold inquiry, i.e., did the district court ask and answer the *Rowley* questions? If the district court answered the *Rowley* questions based on a preponderance of the evidence, then it employed the correct standard.[2]

Our standard of review of the district court's decision on the merits, i.e., did the district court answer the *Rowley* questions correctly, is likewise colored by *Rowley*. We exercise plenary review over the district court's conclusions of law, and employ a clearly erroneous standard of review over the court's findings of historical fact. The inquiries directed by *Rowley* are mixed questions of fact and law. In deciding whether the district court has correctly answered those questions, the issue of whether the district court has properly applied *Rowley* 's substantive rules is subject to our plenary review. *See Bose Corp. v. Consumers*

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2. There is no contention before us that there were any deficiencies in state procedures. Our analysis of the challenged school board decisions will therefore be concerned with the second of the *Rowley* questions.

Union of United States, Inc., 466 U.S. 485, 501 (1984)(clearly erroneous standard of review of factual findings "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact"). However, our review, while plenary, must be conducted within the general framework of deference to state decision-makers dictated by the EAHCA and *Rowley* itself. Courts must evaluate a classification and IEP in light of "Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accomodate the needs of each individual handicapped child." *Smith v. Robinson*, 104 S.Ct. 3469 (1984); *see also DeLeon v. Susquehanna Community School District*, 747 F.2d 149, 152 (3d Cir. 1984) (noting "the limited scope of review over decisions concerning special education placement").

We first address the Wexlers' contention that the district court employed an improper standard of review. We analyze the district court's decisions to determine whether it properly considered all the evidence and measured that evidence against *Rowley*'s substantive standards. The district court, in a very thorough opinion, analyzed the evidence in a responsible and sensitive fashion. It reviewed all the test results, and all the administrative proceedings, including the transcripts and reports. Its findings are detailed and supported by the evidence. At the same time, it gave appropriate weight to the decisions made by those to whose professional expertise Congress committed the day to day implementation of the EAHCA. The district court evaluated each challenged school board action to determine whether it was reasonable in light of the evidence. Since *Rowley* requires that the school board's actions be "reasonably calculated to enable the child to receive educational

benefits," 458 U.S. at 207, it is plain that the district court applied the correct standard of review.

With respect to the district court's conclusions regarding the Wexlers' next contention, i.e., that Douglas was improperly classified and placed prior to 1981, we find no legal errors or clearly erroneous factual findings. While the plaintiffs point to the 1981 reclassification to "neurologically impaired" as a vindication of their longstanding view that neurological impairment was Douglas' primary impairment, we find no error in the district court's conclusion that the reclassification was the result of Douglas' development and maturation, in combination with changes in the applicable regulations and definitions. This is particularly so in light of its specific finding that there was no evidence that Douglas' placement and evaluation reflected bad faith on the part of the Westfield Public School system. We conclude that Westfield's classification and placement were "reasonably calculated to enable [Douglas] to receive educational benefits." 458 U.S. at 207. We thus affirm the district court's conclusions that Westfield made available a free appropriate public education within the meaning of the EAHCA during the years 1972-1981 and that the Wexlers voluntarily refused to avail themselves of this offer.

The Wexlers' third contention involves the application of a specific requirement of the EAHCA to the underlying facts and thus presents no *Rowley* question. They argue that the Midland School should be considered Douglas' placement at the time of the reclassification in 1972, relying on 20 U.S.C. § 1415 (e)(3) which provides that "[d]uring the pendency of any proceedings pursuant to this section . . . the child shall remain in the then current educational placement." If section 1415 (e)(3) had been operative in 1972, it would have required that Westfield reimburse

the Wexlers for Douglas' expenses at Midland. We agree with the district court that the fact that section 1415 (e)(3) did not become effective until 1977 relieves Westfield of any liability for reimbursement. Similar reasoning supports the district court's view that Westfield had no such duty under analogous New Jersey regulations since they did not become effective until 1978. *See* N.J. Admin. Code 6:28-1.9(e).[3]

The Wexlers contend that the district court erred in not applying the law in effect at the time of its decision. In essence, they want retroactive effect given to statutes which contain no provisions warranting retroactive application. We can discern no error in the district court's finding that Douglas' then current placement when section 1415 (e)(3) became operative was the Tamaques School, and that the Wexlers are therefore not entitled to reimbursement under that section.

The Wexlers' final substantive complaint is that the district court erred in finding that they were not entitled to reimbursement for Douglas' post-graduation tuition and transportation expenses for the Summit Center in Jerusalem. They contend that section 1412 (2)(B) of the EAHCA places on Westfield the responsibility for Douglas' education until he reaches the age of twenty-one. This contention involves a question of statutory interpretation over which we have plenary review. Section 1412 (2)(B) of the EAHCA requires the state to provide "a free appropriate public education . . . for all handicapped children between the ages of three and twenty-one

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3. State statutes and regulations concerning the education of handicapped children may be enforced in suits under § 1415 (e)(2) to the extent that they impose higher standards on state or local officials than are required by the EAHCA. *Geis v. Board of Education of Parsippany-Troy Hills*, 774 F.2d 575, 579-81 (3d Cir. 1985).

within the state . . . except that, with respect to handicapped children . . . aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any state if the application of such requirements would be inconsistant with state law or practice . . . respecting public education within such age groups in the state." Department of Education regulations interpret that section to mean that "[i]f a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age." 34 C.F.R. § 300.300 (b)(2)(1984).[4]

At the outset, we note that the district court found that the Wexlers never objected to the issuance of the diploma, to the substance of Douglas' final IEP, or to the forwarding of Douglas' records to the Department of Vocational Rehabilitation for preparation of post graduate planning. They placed Douglas in the Jerusalem school without prior notice to or discussion with the School Board, and only later demanded reimbursement. The record supports those findings. The ALJ agreed with Westfield's position that the Wexlers' unilateral actions were contrary to acceptable procedure.

The district court found no factual basis for plaintiffs' contention that Douglas' IEP had not been completed to the satisfaction of all parties. It also found that Douglas had been properly graduated and given a diploma.

While neither the ALJ nor the district court discussed section 1412 (2)(B)'s requirement of some state responsibilty for education of handicapped children between the ages of eighteen and twenty-one,

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4. New Jersey has regulations that impose a similar requirement. *See* N.J.A.C. 6: 28-1.1(c).

it is clear that they assumed that graduation and the issuance of a diploma terminated Westfield's responsibility. The Wexlers, on the other hand, press upon us the theory that the words of the statute create an absolute duty to continue to provide a free appropriate public education until the age of twenty-one. We shall assume that this argument was advanced in the district court.

We do not find any such requirement in section 1412. That section and its accompanying regulations make clear that the state is only required to provide post-graduate education for handicapped students to the extent and in the same proportion that it does for non-handicapped students. *See Helms v. Independent School Dist. No. 3*, 750 F.2d 820 (10th Cir. 1984), *cert. denied*, 105 S.Ct. 2024 (1985). In *Helms*, it was shown that the graduation of the handicapped students was a sham designed to terminate the school system's responsibility at the earliest possible moment under circumstances where non-handicapped children were provided further schooling. Handicapped children were passed through from year to year with little if any attention paid to satisfaction of the IEP, while non-handicapped students were held back if they had not satisfied the academic requirements of their grade. Thus, non-handicapped students were provided with schooling past the age of eighteen if they needed it while handicapped students were routinely graduated at eighteen. *See id.* at 824. The court therefore ordered the school board to provide the plaintiff with two additional years of free appropriate public education.

There is no such contention here. The district court found that Douglas was properly graduated, i.e., graduated in accord with his IEP which was "reasonably calculated to enable the child to receive educational benefits." *Hendrik Hudson District Board of Education v. Rowley*, 458 U.S. 176, 207 (1982), and

that the completion of the program set forth by the IEP is analogous to successful completion of graduation requirements for non-handicapped students, *see* N.J. Admin. Code 6:28-2.6(a). In view of those facts, it is plain that requiring Westfield to provide post-graduate education for Douglas "would be inconsistant with State ... practice ... respecting public education within such age [group] in the state." 20 U.S.C. § 1412 (2)(B).

IV.

The EAHCA provides a comprehensive scheme for furnishing a free appropriate public education to handicapped children, and commits to medical and educational professionals employed by the state the responsibility for setting forth an individualized program for each child. In addition, the EAHCA sets forth procedures whereby parents may monitor the state and local determinations and protest them if they think the determinations are erroneous. Indeed, the EAHCA allows parents who disagree with their child's placement to place the child elsewhere and receive reimbursement in the event that the proposed placement was inappropriate. *See Burlington School Committee v. Dept. of Education*, 105 S.Ct. 1996 (1985). However, that right to reimbursement exists only when the proposed placement was indeed inappropriate as measured by the standards set forth by the EAHCA and accompanying state and federal regulations.

In this case, Douglas received the education his parents thought best. Westfield made available to Douglas the free appropriate education required by the EAHCA and may not be held financially accountable for the Wexlers' decision to educate him elsewhere.

The judgment of the district court will be affirmed.

Appendix A

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—DECISION OF THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY, DECEMBER 22, 1977

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-610-77
MOTION NO. M-1062-77
BEFORE PART B

JUDGES: CONFORD, MICHELS, PRESSLER

S.W. AND D.W., parents of S.W., a minor

VS.

BOARD OF EDUCATION OF WESTFIELD

ORDER ON MOTIONS/PETITIONS

MOVING PAPERS FILED DECEMBER 2, 1977
ANSWERING PAPERS FILED DECEMBER 12, 1977
DATE SUBMITTED TO COURT DECEMBER 19, 1977
DATE ARGUED
DATE DECIDED DECEMBER 22, 1977

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR REMAND TO STATE BOARD OF EDUCATION

GRANTED	DENIED	OTHER
X		X

Appendix B

SUPPLEMENTAL:

The appeal is remanded to the State Board of Education for reconsideration in the light of its decision in *Diaz v. Board of Education of Roxbury.*

In the event of a redetermination by the State Board of Education in favor of appellants this appeal will be dismissed. In the event of any other determination by the State Board of Education this court retains jurisdiction.

FOR THE COURT:

s/ Milton B. Conford

P.J.A.D.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

Elizabeth McLaughlin
Clerk

WITNESS, THE HONORABLE MILTON B. CONFORD, PRESIDING JUDGE OF PART B, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 22 DAY OF DECEMBER 1977.

Elizabeth McLaughlin
CLERK OF THE APPELLATE
DIVISION

APPENDIX C—DECISION OF THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY, MARCH 4, 1983

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-3150-80T1

"S.W." and "D.W.",

Petitioners-Appellants,

v.

THE BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,

Respondent-Respondent.

Argued January 31, 1983 - Decided March 4, 1983

Before Judges Ard, King and McElroy.

On appeal from New Jersey State Board of Education.

Ralph Neibart argued the cause for appellants.

William D. Peek argued the cause for respondent (Nichols, Thomson, Peek & Meyers, attorneys).

Appendix C

No appearance in behalf of State Board of Education (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Alfred E. Ramey Jr., Deputy Attorney General, on the Statement in Lieu of Brief).

PER CURIAM

This case has had a troublesome history and it is with regret that we see no proper and just alternative but to add another segment to the litigious saga by remanding the matter for further proceedings.

The proceedings in this matter, and in particular the *de novo* hearing ordered by this court and held by the chief classification officer on November 21, 1978, were conducted pursuant to the due process procedures then existing, adopted by the State Board of Education and regarded as in compliance with the mandate of 20 U.S.C.A. § 1401 *et seq.*, the Education of All Handicapped Children Act (EAHCA), particularly § 1415.

While this appeal was pending Judge Debevoise of the United States District Court on April 20, 1982 and on July 7, 1982, declared *N.J.A.C.* 6:28-1.9, the controlling procedural regulation, void as contrary to the unambiguous language of the federal act, particularly 20 *U.S.C.A.* § 1415(b)(2) and (e)(2). (*East Brunswick Bd. of Educ. v. N.J. State Bd. of Educ., et al.*, unreported decision, civil case number 81-3600). The decision was not novel, indeed it was founded upon prior interpretations by federal courts, as to comparable state procedural regulations, in *Grymes v. Madden*, 672 *F.*2d 321 (3rd Cir. 1982); *Robert M. v. Benton*, 634 *F.*2d 1139 (8th Cir. 1980) and *Vogel v. School Bd. of Montrose R-14 School Dist.*, 491 *F. Supp.* 989 (W.D. Mo. 1980). *See also,*

Appendix C

Helms *v. McDaniel,* 657 *F.*2d 800 (5th Cir. 1981), *cert. den.* 71 *L.Ed.*2d 658 (1982).

Judge Debevoise's opinion held that the impartial due process hearing required by 20 *U.S.C.A.* § 1415(b)(2) cannot be conducted, as was done here, by an employee of the agency or unit involved in the education or care of the child. Judge Debevoise, on April 20, 1982, also held that under § 1415(e)(2) the review of the decision made in a proper impartial due process hearing had to be by way of the "civil action," required by that section, filed in a state court of competent jurisdiction or in a federal district court. He ruled "consequently any subsequent administrative review of that decision, taken pursuant to the New Jersey Administrative Code regulations, was void and of no effect . . ."

The Commissioner and the State Board of Education have since attempted to comply with the federal rulings and during the time this appeal was pending have worked out a procedure in which an administrative law judge will conduct the impartial due process hearing and "appeal" would then take place "either to the Superior Court of New Jersey . . . or to a district court of the United States pursuant to 20 *U.S.C.A.* 1415(e)(2)." *N.J.A.C.* 1:6A-5.3, 15 *N.J.R.* 25(b), 29 (January 3, 1983).

We agree with the cited federal decisions and with the acknowledgment of their correctness implicit in the adoption of the new regulations by the Commissioner, the State Board, and the Office of Administrative Law. We will not, nor can we, therefore, persist in the continuation of a process that runs contrary to the clear requirement of the EAHCA. In the circumstances we deem it to be of no moment that appellant has not raised the issue. The form of due process required by the federal act has

not taken place. The decision of the chief classification officer, as well as those of the Commissioner of Education and of the State Board of Education in this pending matter, are contrary to the federal mandate of the act and our duty is clear.

Accordingly, those decisions are vacated. The matter is remanded to the Commissioner of Education for the purpose of providing an impartial due process hearing before an administrative law judge consistent with the federal act, the federal decisions and this opinion.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Elizabeth McLaughlin
Clerk

APPENDIX D — DECISION OF THE OFFICE OF ADMINISTRATIVE LAW, STATE OF NEW JERSEY, JUNE 9, 1983

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDS 2923-83
AGENCY DKT. NO. 83-1035

D.W.,

Petitioner

v.

WESTFIELD BOARD OF EDUCATION,

Respondent

APPEARANCES:

Ralph Niebart, Esq., for petitioner

William D. Peek, Esq., for respondent
(Nichols, Thomson, Peek & Meyers, attorneys)

Record Closed: May 20, 1983 Decided: June 9, 1983

BEFORE THOMAS E. CLANCY, ALJ:

OVERVIEW

In 1968, the respondent school district classified the petitioner,

Appendix D

D.W., as "Communication Disordered - Perceptually Impaired" (Exhibit P-73, item 6). Accordingly, he was placed in the Midland School, North Branch, New Jersey at the respondent's expense (Exhibit P-73, item 7). This placement was continued through the 1971-1972 school year (Exhibit P-73, item 16b). For the school year 1972-1973, respondent retested D.W. and classified him as "Mentally Retarded - Educable" and recommended that he be assigned to the Intermediate Educable Class at the Tamaques School in Westfield (Exhibit P-73, item 23). D.W.'s parents refused to consent to the change in classification and the placement; instead, they obtained independent evaluations of D.W. and submitted them to the respondent in an effort to have the classification and placement changed. This did not occur and D.W.'s father was urged to register D.W. in the recommended Westfield School; he was also advised that the Westfield Board of Education would "not be responsible" if he enrolled him at the Midland School (Tr. I, p. 13) and that Westfield would not accept financial responsibility for tuition in such a circumstance (see Exhibit P-73, item 24). Nevertheless, he continued D.W.'s placement at the Midland School and made numerous attempts to have D.W.'s classification and placement changed, ultimately winding up in the Appellate Division of the Superior Court. He did these things without ever finding out what the Tamaques School program provided or whether it differed from the one given at Midland School (Tr. I, pp. 56, 57). Along the way, he was encouraged only once — when the Westfield Board of Education indicated that D.W. might be eligible for enrollment in a new class for the neurologically impaired scheduled to begin in September 1975 (see Exhibit P-76); however, this class never materialized.

D.W.'s placement at the Midland School lasted through the 1977-1978 school year and was paid for by his parents. Then,

on account of his age, he was transferred to Maplebrook School in Amenia, New York, where he remained through the 1981-1982 school year. D.W.'s father paid for D.W.'s attendance at Maplebrook from 1978 through 1981, while the respondent paid for the 1981-1982 school year (Tr. I, p. 31), ostensibly because it had reclassified D.W. as "Neurologically or perceptually impaired - perceptually impaired" on March 11, 1981 (see Exhibit P-69). When D.W. satisfactorily completed his Individualized Educational Program at Maplebrook School, he was graduated from the Westfield Public School system and awarded a standard diploma (Tr. I, p. 41). Since September 1982, D.W. had been attending the Summit School in Israel for further specialized instructions and training.

As a result of the above, D.W.'s parents are claiming that they are entitled to reimbursement for (a) tuition and transportation expenses incurred, (b) legal fees, and (c) interest on the foregoing.

I.

ARE D.W.'s PARENTS ENTITLED TO LEGAL FEES?

Historically, "The Commissioner of Education has consistently held that he lacks the requisite subject matter jurisdiction to award punitive damages, counsel fees and interest, which 'may properly be awarded only by the courts absent statutory provision granting such power to an administrative authority' *North Bergen Fed. of Teachers, Local 1060 v. North Bergen Bd. of Ed.*, 75 *S.L.D.* 461, 467 (1975)*; *accord*

* Opinions rendered by the Commissioner of Education are reported as *School Law Decisions* (cited as *S.L.D.*).

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Meisenbacher v. Newark Bd. of Ed., 80 *S.L.D.* ____ *(1980); Winter v. North Bergen Bd. of Ed.*, 75 *S.L.D.* 236 (1975)*." *Fallon v. Scotch Plains-Fanwood Bd. of Ed.*, 185 *N.J. Super.* 142, 147 (Law Div. 1982).

Most recently, this issue was dealt with by Judge Feller in a similar case: "This court deems an award of counsel fees to plaintiffs to be inappropriate in this matter, and has been provided with no persuasive authority to the contrary. Therefore, counsel fees and other costs of suit shall be borne by the respective parties." *Fallon, supra,* at p. 151.

In addition, there are no provisions in the New Jersey Administrative Code or the Rules Governing the Courts of the State of New Jersey which would authorize the award of legal expenses.

On the strength of the foregoing, therefore, I CONCLUDE that the petition and his parents are not entitled to the award of legal fees.

II.

ARE D.W.'S PARENTS
ENTITLED TO REIMBURSEMENT FOR TUITION AND
TRANSPORTATION EXPENSES INCURRED?

The pertinent regulation to be considered in this regard in *N.J.A.C.* 6:28-4.8, which reads as follows:

"Placement by parents

If an educationally handicapped pupil has

available a free appropriate public education offered by a local school district and the parent chooses to place the pupil in a private school, neither the state nor the local public school district is responsible for the cost of the private school placement." (This provision represents a codification of the result reached in *K.K. v. Westfield Bd. of Ed.*, 1971 *S.L.D.* 234 and 1973 *S.L.D.* 34.)

(A)

In 1972, when D.W.'s classification was changed from "Communication Disordered - Perceptually Impaired" to "Mentally Retarded - Educable," a specific educational program was formulated and made available for the petitioner (see Exhibit P-73, item 23b). Despite this, neither one of D.W.'s parents checked into its particulars, nor did they compare the Westfield program with what was available at Midland School (Tr. I, pp. 56, 57 and Tr. II, p. 8). At the time, D.W.'s mother felt "no need to know" about such matters because she didn't think D.W. was mentally retarded (Tr. II, p. 8). She acknowledged that she objected to the reclassification "partially" because of "the label of mentally retarded" (Tr. II, p. 8). She opposed the change because she thought it would be detrimental to D.W.'s emotional and academic well-being (Tr. II, p. 3). In any event, I FIND that the Westfield School District made available a free, appropriate public education to D.W. for the 1972-1973 school year. I additionally FIND that for whatever reasons, D.W.'s parents did not avail themselves of the opportunity presented, nor did they make any inquiry as to what it was all about. And, they enrolled D.W. at Midland School after having been told twice that Westfield would not pay for the costs involved (see Tr. I, p. 13

and Exhibit P-73, item 24). Accordingly, I CONCLUDE that they voluntarily chose (a) to effect D.W.'s placement at Midland School commencing in September 1972, and (b) to continue his enrollment in private schools through the end of the 1980-1981 school year. Parents who choose private placements over appropriate placements offered by a board solely because they believe that the private placement is better for their child may not receive reimbursement. *Cf. Bd. of Ed. of Hendrick Hudson Central School District v. Rowley,* 50 *U.S.L.W.* 4925 (1982).

(B)

Furthermore, a painstaking review of the voluminous documentation in evidence as well as close scrutiny of the testimony presented by both sides does not demonstrate that the 1972 reclassification and its continuance until the early part of 1981 was arbitrary, capricious or unreasonable. Accordingly, I CONCLUDE that the Westfield Board of Education acted in an appropriate fashion and was duly circumspect, diligent and conscientious at all times. In short, there was nothing irregular or abusive in its action. This is established by the chronological commentary set forth in the respondent's brief as follows:

> "All of the factors presented by the applicable statutes and rules in 1972 were considered by the Westfield Child Study team in reaching the decision to classify D.W. as Educable Mentally Retarded. At the request of the parents, the classification was reviewed by the county Child Study team and the Regional Co-ordinator. Both approved the classification (Exhibit P-73, items 34, 35; Exhibit R-1) [sic].

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An examination of the materials considered by the Child Study team in 1972 supports the EMR classification. The tests show intelligence in the retarded range, and they are confirmed by the reports of D.W.'s progress at Midland School. In 1975, when Dr. Donovan became head of Special Services in Westfield, and following D.W.'s enrollment in the system, the whole evaluation procedure was repeated. Again the tests indicated mental retardation, but the parents would not agree and requested a neurological examination. The parents selected Dr. Avrum L. Katcher, who, when testifying on May 3, 1983, qualified himself as a pediatrician and stated that on November 24, 1975, he was the Pediatric Director of Hunterdon Medical Center.

Dr. Katcher's report (Exhibit P-55) was the subject of a special meeting of the Child Study team January 21, 1976 (Exhibit P-58) followed by a "staffing" January 26, 1976 (Exhibit R-4), when the full team reached the consensus that "D.W. is in fact Mentally Retarded - Educable."

* * *

The team recommended placement in the program of the Intermediate-Educable Class at Tamaques School, Westfield.

On February 23, 1979, following the decision approving the classification and placement of D.W., the Westfield Director of Special Services

again offered the appropriate program to D.W.'s parents (Exhibit P-60).

The parents did not accept the placement and in fact did not notify the Westfield School of D.W.'s move from Midland to Maplebrook until October 1980 (Exhibit P-62).

At that approximate time, they retained their present counsel and through him arranged for further testing, a review of the entire file, and another neurological examination by a doctor selected by the parents, Dr. Denckla (Exhibit P-66).

On February 9, 1981, a staffing was held with members of the Child Study team, both of D.W.'s parents and Dr. Donovan, as well as counsel for the parents, Mr. Neibart. An IEP was developed which was later refined at the request of the parents and their legal counsel (Exhibit P-69). Permission to implement the IEP was signed by D.W.'s father (Exhibit R-2).

The 1981 classification agreed upon was: Neurologically or Perceptually Impaired: Perceptually Impaired (Exhibit P-69).

The 1981 classification reflects two factors absent when D.W. was classified in 1972:

(1) The Code which became effective August 11, 1978 contained a different definition of "Mentally Retarded":

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N.J.A.C. 6:28-1.2(5) "Mentally retarded" means possessing an intellectual capacity below the average range of intelligence and having deficits in adaptive behavior which adversely affect educational performance and social functioning as distinguished by the following:

> (i) 'Educable' means a level of retardation which is characterized by intellectual capacity, as measured by a clinical test of intelligence, within a range encompassing approximately one and one-half to three standard deviations below the mean and a low level of ability to think abstractly."

The new standard added is "having deficits in adaptive behavior," and the social assessment (Exhibit P-64), and psychological evaluation (Exhibit P-65) completed in November 1980 both reflect D.W.'s strength in adaptive behavior.

(2) The second factor is D.W.'s adolescent development. Dr. Perlman's psychological evaluation in 1980 (Exhibit P-65) recited his deficiencies on intelligence tests. Her testimony and the report both referred to his "adaptive behavior." In her testimony she attributed his improvement in adaptive behavior to both his training and adolescent development, and the final paragraph of her report clearly states her evaluation of his adaptive behavior:

> This impression of developing competency in

> areas of adaptive behavior is corroborated by the report of both home and school. (Exhibit P-65, page 4)
>
> The final classification of "Neurologically or Perceptually Impaired: Perceptually Impaired" is entirely consistent with the earlier classification and was a proper classification in the light of information available in 1981 and the then applicable rules."

On the basis of the foregoing, I CONCLUDE that the petitioner and his parents are not entitled to reimbursement and transportation expenses for the period of time extending from the beginning of the 1972 school year to the end of the 1980-1981 school year. *A fortiori,* no interest is deemed to be due and owing in this matter.

III.

ARE D.W.'s PARENTS ENTITLED TO ANY ADDITIONAL MONIES FOR THE SCHOOL YEARS 1981-1982 AND 1982-1983?

Petitioner's most recent Individualized Education Program (Exhibit P-69) was accepted by his father on September 28, 1981 (Exhibit R-2). The Program called for the award of a standard diploma upon its satisfactory completion and nothing more. It was in effect during the 1981-1982 school year *only.* In May 1982, Assistant Superintendent of Schools James F. Donovan specifically advised D.W.'s father that the school district would not assume responsibility for D.W. after graduation (see Exhibit R-13). Nevertheless, D.W. was placed for further instruction and training

at the Summit School in Israel without consulting the Board of Education or its Child Study team about this unilateral move. It was felt that "To place D.W. in a private school without our knowledge and then request our support is contrary to acceptable procedure" (Exhibit P-13). Certainly the failure to notify the Board and the unilateral action taken by D.W.'s father effectively deprived the Board of any input whatsoever, which could well have brought about a different result (see *N.J.A.C.* 6:28-2.2(b) and *N.J.A.C.* 6:28-.2(c)(7)).

Accordingly, the Board of Education should not be held accountable or responsible for such a state of affairs as now exists. Equitably, any obligations the Board had to the petitioner were fulfilled when he was awarded his diploma. There was simply no understanding between the parties that the Board would be responsible for any expenses beyond the 1981-1982 school year. And, as far as any additional monies for that year being owed, the agreement between the Board and D.W.'s parents is conclusive evidence that a meeting of the minds had been reached. The monies accepted by D.W.'s parents represented a full settlement with respect to how much the Board would be obligated to pay for that year (see Exhibit P-80). Pursuant to such an arrangement, further claims are precluded. Hence, the Board has no further responsibilities to discharge in this matter. I therefore CONCLUDE that D.W.'s parents are not entitled to any additional monies by way of reimbursement or otherwise for the school years 1981-1982 and 1982-1983.

DISPOSITION

On the strength of the foregoing, I ORDER that the Westfield Board of Education continue to DENY reimbursement to the petitioner and/or his parents for (a) tuition and transportation

expenses incurred, (b) legal fees, and (c) interest on the foregoing.

This decision is final pursuant to 20 *U.S.C.* §1415(e) and 34 C.F.R. 300.509.

Dated: 6-9-83

s/ Thomas E. Clancy
THOMAS E. CLANCY, ALJ

APPENDIX E—MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, NOVEMBER 27, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil #83-2745

SEYMOUR WEXLER and DAISY WEXLER, individually, and on behalf of their child, DOUGLAS WEXLER,

Plaintiffs,

v.

WESTFIELD BOARD OF EDUCATION,

Defendants.

JUDGMENT

This matter having been heard by the court and the record having been considered; and counsel having submitted proposed Findings of Fact and Conclusions of Law;

IT IS HEREBY ORDERED AND ADJUDGED that the complaint be and is hereby dismissed and judgment will be entered in favor of the defendant, with costs, all in accordance with a memorandum opinion filed this date.

s/ Frederick B. Lacey
FREDERICK B. LACEY
UNITED STATES DISTRICT
JUDGE

Dated: November 27, 1984

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil #83-2745

SEYMOUR WEXLER and DAISY WEXLER, individually, and on behalf of their child, DOUGLAS WEXLER,

Plaintiffs,

v.

WESTFIELD BOARD OF EDUCATION,

Defendant.

MEMORANDUM OPINION

LACEY, D. J.

Plaintiffs, Dr. Seymour Wexler and his wife, Daisy Wexler, seek review of the classification and placement decision made in 1972 of their son, Douglas Wexler, by the defendant, the Westfield Board of Education.

Before reaching the procedural history created by this case, a discussion of factual background is necessary. Douglas Wexler, the youngest of five children, was born February 18, 1963. When he was five years old, he was referred for medical examinations for speech difficulties.[1] The Westfield Child Study Team identified

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1. See reports of Arthur Winter, M.D., dated November 3, 1967, for neurological consultation (P1); and Joan Shephard (P2).

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Douglas as a handicapped child in June 1968. He was placed at the Midland School and classified as "Communication Disordered and Perceptually Impaired."

Dr. Winter diagnosed Douglas as suffering from "Speech Difficulty - poor articulation. Rule out: Mild expressive aphasia - organic - related to cerebral anoxia." (P1). A speech evaluation performed by Joan Shephard of the Children's Specialized Hospital in Westfield, New Jersey, diagnosed a speech disorder. An Initial Learning Evaluation by the Midland School concluded that "Douglas is a youngster of average intelligence who projects the symptoms of mild aphasia. He will have to develop a more adequate language communication prior to general class placement. This would be best accomplished in small class placement specific for language development, or concentrated individual therapy." (P3).

On March 26, 1968, an examination of Douglas was conducted by Arlene Falk of The Presbyterian Hospital. She noted in his history that "According to the mother, a neurological examination was normal and psychometrics revealed normal functioning 'except for communication.' " (P4). Miss Falk concluded that "It was my impression that this child who seems to have good basic intelligence, shows signs of Central Nervous System deficit (disinhibition, restlessness, poor attention), a severe expressive language disorder and dysarthria." (P4).

In a memorandum to Mr. Tomlinson, Dr. Stadeck of the Child Study Team wrote in May 1968 that "From material submitted by various organizations no doubt exists that this boy has central nervous system involvement coupled with a serious language disorder. He also demonstrates a number of perceptual involvements in several areas. Without a doubt this boy shows

a serious learning disability." (P5). Dr. Stadeck noted that Mrs. Grieg, Westfield's Learning Disability Specialist (LDS), concluded that Douglas' "perceptual impairments prevent him from learning in the usual manner. She established the boy's intellectual potential as above the retarded level and this confirms my own opinion during my work with the boy." (P5). Dr. Stadeck concluded that Westfield's programs "are not in line with his needs." (P5). It was agreed that Douglas would be enrolled in the Midland School at the school board's expense.

The Child Study Team's classification meeting concerning Douglas occurred in June 1968. The staffing report notes that Dr. Stadeck "would not attempt to test the child with a full psychological battery since the child's lack of speech, communication problems, short attention span and temporary excitability would preclude valid testing." (P6). The staffing report referred to the lack of "definitive determination of intelligence." (P6).

On November 19, 1968, Douglas was given a psychological examination by Virginia Bennett, Ed.D. She conducted the new Wechsler Test, known as the WPPSI, because it dealt with varying verbal and performance tasks. She concluded that "On the WPPSI, Douglas' Verbal Scale IQ was 95, Performance Scale IQ 69, Full Scale IQ 81. The verbal IQ is 'average,' performance IQ 'defective,' with the full scale falling within the 'borderline' range of intellectual functioning." (P8). Dr. Bennett stated that "It is obvious that there are possibilities of considerable development in all areas, and certainly potential for learning academic skills." (P8). Dr. Bennett also concluded that "to predict definitely at the early age of five is both unfair and unduly pessimistic." (P8). Continuation at the Midland School was recommended.

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On December 20, 1968, Edward Scagliotta, Director of the Midland School, completed a generally favorable evaluation of Douglas' progress during his first semester there. He noted that in reading Douglas scored a "Low Normal" and in mathematics his grade placement was "Kindergarten 0.1." (P9).

In a memorandum dated June 26, 1969, Mr. Stadeck recommended that Douglas be readmitted to the Midland School for the 1969-1970 academic year. The memorandum noted that Douglas "is classified as auditorially handicapped." (P15). In May 1971, Mr. Stadeck informed Mr. Scagliotta that Douglas would be continued at the Midland School during the 1971-1972 school year at the board's expense. (P16).

A generally favorable Student Progress Report was completed by personnel from the Midland School concerning Douglas' performance during the March 1972 to June 1972 academic period. (P17).

In April 1972 Douglas was examined by Dr. Blanche Isaac in connection with a re-evaluation by the Child Study Team. She noted that "On the WISC Douglas obtained a Verbal Scale I.Q. of 76 (borderline range), a Performance Scale I.Q. of 55 (mental defective range) and a Full Scale I.Q. of 63, reflecting overall intellectual functioning in the mental defective (Educable) range." (P20). Dr. Isaac noted that "[w]hile functioning in the Performance area was uniformly low, there was one relatively significant strength in the Verbal area in Douglas' ability for verbal abstract thought which was in the low-average range." (P20).

She concluded that "Current testing suggests relative strength only in the area of verbal abstract thought with overall functioning in the mental defective range. While Douglas' limitations,

particularly in the Performance area, seem dramatically related to organic involvement, there appear to be few areas of strength to allow this youngster to compensate for these difficulties." (P20). Douglas was nine years old at the time of this re-evaluation.

Also in April 1972 Douglas was evaluated by Helen Peck of the Child Study Team. Her test interpretations note that

> Doug functions academically like an impulsive, very beginning first grader. . . [H]is scores suggest a very limited potential. He seems to have a very limited number of things he can talk about even if the neurological manifestations of his disability could be brought under control. He was able to maintain his concentration for six items on the Vocabulary section of the Gates MacGinitie test and thereafter marked answers at random. . . In arithmetic he can function only if the number progression is by ones. This performance seems rather disappointing since he has had school instruction for some time.

(P21).

She also concluded that

> It seems highly unlikely that Doug could function in the Special Supplemental Class at Tamaques. Certainly he needs to be in a small group where the stimuli can be kept under control. Quite possibly an Educable Class would be appropriate placement.

(P21).

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In June 1972 a neurological evaluation was performed by Frederick Ambrose, M.D., and provided to Mr. Stadeck for use by the Child Study Team in its re-evaluation. Dr. Ambrose refers to negative results in an electroencephalogram performed previously by Dr. Arthur Winter, a neuro-surgeon. In his neurological examination, Dr. Ambrose refers to Douglas as appearing to be reasonably bright. His impression is "No gross neurological problem. (2) Speech impediment. (3) Borderline intelligence level(?)" (P22).

At the Child Study Team staffing on June 16, 1972, the team consisted of Dr. Isaac, School Psychologist; Mrs. Apgar, School Social Worker; Mrs. Grieg, Speech Specialist; Mrs. Peck, Learning Disabilities Specialist; and Mr. Stadeck, the Supervisor of the Special Services program and the School Psychologist. The team reviewed the reports discussed above and made a visit to the Midland School. It was noted that "Mrs. Grieg stated that the elimination of neurological deficits would force us to accept our own findings of mental retardation as the primary deficit." (P23). Dr. Isaac concurred, based on her testing and a conclusion of "an Age Equivalent of approximately 6-6." (Six years and six months). "Mrs. Grieg indicated that if placement was developed in our Educable Class he would require rigorous articulation and language therapy." (P23).

In summary, Mr. Stadeck stated

> the boy's original evaluation by us had indicated a functioning level at the retarded stage but that his language difficulties and possibly neurological deficits had allowed us to conclude that he should not be classified as mentally retarded but should be given the opportunity of attending special classes

> at the Midland School . . . The team felt that if the boy had the potential for making the correction he would have demonstrated this during the past four years.

(P23).

Accordingly, Douglas was reclassified as a "Handicapped Child," and categorized as "Mentally Retarded - Educable" and placement was recommended in the Intermediate Educable Class at the Tamaques School. A proposed educational program was also outlined in the staffing report. In addition, an Individual Education Program (IEP) was established by the Board. (P23).

Mr. Stadeck notes in a memorandum to Mr. Steengrafe of the Tamaques School that "On September 1, 1972, Dr. Wexler . . . phoned to state that the child (Douglas) would not attend our classes but would be returned to the Midland School. It was explained that under these circumstances Westfield could not accept financial responsibility for tuition." (P24).

The plaintiffs objected to the change in classification. It is this change in classification and placement that commenced the dispute underlying this lawsuit. In the fall of 1972 the Wexlers obtained other evaluations of their son.

One was performed by Lee Salk, Ph.D., at the New York Hospital - Cornell Medical Center. Dr. Salk performed the Peabody Picture Vocabulary Test (PPVT) in order to evaluate Douglas' intellectual ability. Dr. Salk rejected the Wechsler Intelligence Scale for Children and the Stanford-Binet Intelligence Test because, he stated, they "would measure his (Douglas') defect rather than his intellectual potential." (P25). Dr. Salk reported that

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> On Form A of the PPVT which was administered first he achieved a mental age of 9 years 8 months against his chronological age of 9 years 7 months which reflects an I.Q. that is well within normal limits. In an attempt to measure the reliability of this score I administered Form B of the same test and again obtained an I.Q. level that was within normal limits. His mental age on this test was 8 years 9 months which, while lower than that on Form A, was still within the same range. . . On the basis of these results I consider Douglas to have average intelligence and some central nervous system dysfunction which manifests itself in a perceptual disorder and a learning disability. He is clearly not retarded. . .

(P25).

Dr. Wexler submitted Dr. Salk's report to Mr. Stadeck in a letter dated October 13, 1972. In this letter, Dr. Wexler indicated that "In addition to the intelligence testing, a neurological criteria [*sic*] at the Cornell Medical Center would classify Douglas as having fine neurological defects that did not present themselves in past gross neurological examinations submitted to you. Consequently, based upon our conversation and re-evaluation at the New York Hospital I am requesting Douglas' status be reconsidered by the Westfield Special Services and you recommend to the Westfield school system that Douglas' status be reconsidered by the Westfield Special Services and you recommend to the Westfield school system that Douglas continue his special education classes as offered at the Midland School." (P26).

On February 1, 1973, Gail Solomon, M.D., submitted an

evaluation of Douglas. Her report included a review of the medical reports discussed above as well as a reference to an EEG and skull x-ray done in New Jersey in January 1973 and "reported as normal." (P27). Based on this summary of prior reports and her own observations, Dr. Solomon stated:

> In summary I feel that Douglas has evidence of organic cerebral dysfunction as evidenced by his marked difficulty on Bender testing, his indistinct speech patterns, his mixed confused dominance on testing, his poor performance and tandem gait and awkwardness in hopping, his poor fine motor coordination. In addition the chorioretinitis in the right fundus suggests that perhaps this neurological dysfunction occurred very early in life perhaps even prenatally and may have caused the insult to the retina as well as to the central nervous system. In view of the conflicting results in the psychological tests, Douglas has on testing either normal intelligence or borderline intelligence but is certainly not retarded.
>
> I feel strongly that this boy has normal or borderline normal intelligence and should be given every benefit of special education in small classes for brain injured children and not be placed with retarded children since he is not retarded. It is a false estimate to average the performance and verbal since in a child who has learning and visual motor and coordination difficulties on an organic neurological basis.[*sic*]

(P27).

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Following receipt of the Solomon report from Dr. Wexler, Mr. Stadeck informed Dr. Wexler that the Child Study Team would review Douglas' classification. (P29).

By letter of April 2, 1973, Mr. Stadeck informed Dr. Wexler that the Child Study Team had met. The "team was already aware of many of the signs mentioned by Dr. Solomon since these signs had been noted in examinations given by our team or by other medical reports submitted to us. The team, therefore, found it impossible to override our previous classification and is therefore maintaining the classification of Mentally Retarded - Educable." (P30). Mr. Stadeck also informed Dr. Wexler that "it would be necessary for us to consider definite hard signs of neurological involvement in order to achieve a primary classification of Neurologically Impaired." (P30).

Dr. Wexler then contacted Mr. Law, Superintendent of Westfield Schools, concerning Douglas' classification. Mr. Law informed Dr. Wexler that "The team has been aware of certain neurological involvements with this child but has come to the conclusion that such neurological findings are in line with those found in many retarded children. Mr. Stadeck informs me that medical records available to them show no gross neurological impairment. In line with the interpretation of the Beadleston Law and strong recommendations made by Dr. Ringelheim of the State Department of Education, the Westfield team is continuing to carry the child under the classification of Mentally Retarded - Educable." (P32).

On September 30, 1974, Dr. Solomon submitted a second evaluation of Douglas based on her neurological examination. She concluded:

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> My impression is that Douglas has evidence of organic neurological impairment and has minimal cerebral dysfunction.
>
> Douglas requires special education in a small class for brain injured children with minimal cerebral dysfunction but who have normal intelligence. Douglas has made progress in the school that he is attending and it would be advisable for him to continue in this special education study.

(P37).

On October 17, 1974, Douglas was re-evaluated by the Westfield Child Study Team. (P38). The WISC test shows a Verbal IQ of 79 , a Performance IQ of 61 and a Full Scale IQ of 67. (P38). Douglas was 11 years and 7 months old at the time of this re-evaluation.

Dr. Isaac's report, based on this examination, reviewed her specific test results and concluded:

> Overall level of attainment and patterning of tests' scores remain virtually unchanged since the time of the last evaluation. Thus Douglas is still functioning in the mental defective (Educable) range of intelligence. Verbal abstraction is still an area of strength (functioning in this area is age appropriate) and Douglas showed relative strength in the understanding of cause and effect relationships. With the exception of these two areas of strength, however, functioning is uniformly low with particular difficulty in those areas requiring

> motor expression and visual motor integration. In summary, Douglas is a youngster exhibiting many deficits, probably organic in derivation, with the result that both intellectual and social functioning are limited. The obtained I.Q., as was the case in previous evaluations, places Douglas in the range of mental retardation.

(P38).

On October 21, 1974, Douglas was evaluated by Helen Murphy, LDT-C, of the Child Study Team. Her report included details of the results of each test. She concluded that

> Academically, Doug is functioning at approximately a middle to high first grade level.
>
> A comparison of scores obtained in our evaluations of Douglas in April, 1972 and October, 1974, indicate [*sic*] that progress has been extremely limited.
>
> Doug's initial and present evaluation indicate that progress in reading has been negligible. The most recent evaluation reveals that Doug is functioning at an approximate primer level, but he still has difficulty with sound-Symbol association. This is in agreement with the September, 1974 report from Midland School . . .

(P40).

The Child Study Team attended a staffing on November 11,

1974, to review the classification and placement recommended for Douglas. They reviewed the reports submitted by Dr. Isaac and Miss Murphy. The team reported that

> overall level of attainment and patterning of test scores remain virtually unchanged [from 1972 to 1974]. Thus, in 1972 Douglas had obtained a Verbal Scale IQ of 76, Performance Scale IQ of 55 and Full Scale IQ of 63. It is to be noted that at that time a non-verbal test of intellectual potential (Columbia Mental Maturity Scale) was also administered yielding an IQ of 63. Current testing yielded a WISC Verbal Scale IQ of 79, Performance Scale IQ of 61 and a Full Scale IQ of 67. Thus, Douglas is still functioning in the mental defective (Educable) range of intelligence . . . Miss Murphy pointed out that both her testing Douglas' actual academic function, as reported by the private school where he has been a student for over 6 years, suggest that Douglas is not achieving even up to what might be expected on the basis of obtained IQ's. . . According to Miss Murphy . . . progress has been extremely limited.

(P42). Based on this meeting, the team recommended that Douglas be classified as mentally retarded, Educable, and be placed in Mrs. Reid's group in Tamaques School.

In a letter dated September 18, 1975, James Donovan, Ph.D., Director of Special Services (who replaced Mr. Stadeck), informed Dr. Wexler's attorney, David Schechner, Esq., that "It is the professional judgment of the Child Study Team that the educability

of this youngster and not the possible neurological involvement is of paramount and primary educational importance in determining his placement and program." (P54).

On November 24, 1975, Douglas was examined by Avrum Katcher, M.D., Director of the Child Evaluation Center at the Hunterdon Medical Center in Flemington, New Jersey. Based on his examination and history, Dr. Katcher concluded:

> I feel that Douglas is a physically normally developed and nourished boy of 11 years (should be 12) and 9 months. He has a static encephalopathy secondary to gestational factors related to prematurity. This includes what amounts almost to an atonic diplegia, multiple severe cognitive difficulties, an expressive and possible receptive language disorder. He probably has dull or very low average intellectual potential. I suspect he is not really retarded. I think his performance on testing is related to (a) the fact that he has a rather severe language disorder; (b) the fact that he has other cognitive problems related to his encephalopathy and (c) the fact that he has a low self image and has lost most of his motivation.
>
> It appears to me that he probably has the potential to graduate high school in a vocational program and to achieve at least some degree of competitive independence . . . If the school plans to continue an administrative classification as a handicapped child, I believe that of neurologically impaired would be most appropriate.

(P55).

Appendix E

The Child Study Team met on January 21, 1976, to discuss Douglas' classification in light of the report the team received from Katcher. The team concluded that "Douglas' primary educational handicap is his educability and that this may be caused by a neurological impairment." (P58).

As a result, the Department of Special Services recommended a classification of Multiply Handicapped: Primary - Mentally Retarded - Educable; Secondary - Neurologically Impaired. Placement was recommended in the Educable - Mentally Retarded class at the Tamaques School. (P59). Dr. Wexler's attorney was so informed by letter of March 2, 1976. (P59).

Douglas was re-evaluated on November 24, 1980, by Debora Springarn, LDT-C. Douglas was 17 years and 9 months old at the time of this testing.

Based on the Woodcock-Johnson Psycho-Educational Battery, Douglas scored a grade level of 1.3 and an age score of 6 years and 8 months in reading, a second grade score and an age level of 7 years and 2 months in mathematics and a grade score of 1.5 and age score of 6 years and 8 months in written language. (P63). Miss Springarn gave a detailed analysis of the data underlying these scores. Miss Springarn also administered the Gates-MacGinitie Reading Test, the Gray Oral Reading Test, the Morrison-McCall Spelling Scale and the Beery Developmental Test of Visual-Motor Integration. The results of each of these tests were comparable in age and grade levels.

Douglas was evaluated by Blanche Isaac Perlman, Ed.D., on November 25, 1980, for review by the Child Study Team. Douglas was then a resident at the Maplebrook School in Amenia, New York. On the WAIS test, Douglas scored a Verbal I.Q. of

86, a Performance I.Q. of 64 and a Full Scale I.Q. of 75. (P65). In her analysis Dr. Perlman stated;

> Comparing the results of the current evaluation with those of the earlier evaluations (4/72 and 10/74), one sees a consistent pattern of functioning. Verbal area skills remain a relative strength compared to very real problems in the areas dependent upon perceptual-motor integration and pencil manipulation. It is good to note at this time the apparent effect of adolescent brain development on Douglas' current functioning. Thus, although the approximately twenty point discrepancy between verbal and performance area functioning is still in evidence, Douglas' verbal expressive skills are not in the Low Average range as compared to former borderline functioning.

(P65).

Douglas was examined on December 30, 1980, by Martha Denckla, M.D. She concluded that

> In summary of the neurological, this is certainly a youngster who has elementary neurological motor system involvement of the nature but not of the degree which we would call "cerebal [*sic*] palsy." It is only a matter of degree; he does have mixed and moderately-impairing "neurological impairment" in the classical sense of the word. It is upon this that a great deal of my reasoning will rest.

Appendix E

In terms of the mental status, obviously very important in terms of school placement, it is paradoxical that at this point in his life Douglas Wexler has his best functions in the verbal areas. Thus, he is able to come out with a low-average (equivalent of 86 of the Peabody Picture Vocabulary Test) and his formulation of verbal expression, as previously noted, is one of his best functions . . . on the Oldfield-Wingfield naming test he came out with 20 correct, which is a solid score for a person who is about 10 years of age or low-average adult. He was able to repeat sentences at the 8-year level but he is totally unable to cope with digits within the normal range, again he cannot do the alphabet but was all right with counting backwards and saying the months on the calendar. Thus, there are (unintelligible) difficulties with rote sequential and short-term auditory-verbal sequential memory functions which certainly are in the very severely impaired category and have a great deal to do with his reading disability, especially if somebody is trying to use phonics and the blending with this boy who has no span whatsoever (although I doubt that anyone is doing this in a special education setting).

. . . Nonetheless, it is remarkable how beautifully informed he is on personal, social and current events information. He also does much better on the connected logical memory passages where there is some meaning and some structure to the verbal memorization. This is an argument in the direction of seeing him as a person who is more inpaired

> on the automatic or "tape-recorder" rote level of verbal than on the long-term associative and meaningful level of language. In a sense, this is an important sign and the discrepancy is in the direction of conceptualizing him as "neurologically impaired" rather than as flatly a deficient person in mental status.

(P68).

The Westfield Child Study Team met in February 1981 and reclassified Douglas as "Neurologically or Perceptually Impaired: Perceptually Impaired." (P69). Placement was recommended for the Maplebrook School, his then-current placement. The cost was assumed by the Westfield Board of Education. An IEP was developed and agreed upon on March 11, 1981. *See* Appendix A. This IEP was revised as of September 12, 1981. *Id.*

At the completion of the 1981-1982 school year, Douglas was graduated from the Maplebrook School, and received a standard diploma from the Westfield Public Schools.

In September 1982 plaintiffs placed Douglas in the Summit Collegiate Studies Center in Jerusalem, Israel. Regular progress reports have been submitted to the plaintiffs. When Dr. Wexler informed the Westfield Board of Education of his son's enrollment in Summit, the board responded that it would not be responsible for the tuition costs. Plaintiffs also seek reimbursement for their tuition and expenses in connection with their son's placement at the Summit School since 1982.

Appendix E

PROCEDURAL BACKGROUND

In May 1975 plaintiffs filed a petition with the Commissioner of Education seeking administrative review of the 1972 reclassification decision. The decisions rendered by the Commissioner of Education were vacated by the New Jersey Appellate Division. Plaintiffs' first appeal to the Appellate Division resulted in a 1977 decision remanding the matter to the State Board of Education.

Plaintiffs' second appeal resulted in a decision on March 4, 1983, vacating the decisions rendered on the prior remand and remanding the matter to the Commissioner of Education for an "impartial due process hearing before an administrative law judge consistent with the federal act, the federal decisions and this opinion."

After hearing testimony and reviewing the classification, two classification officers and the administrative law judge (ALJ) concluded that:

> 1. A review of the progress reports of the private school indicate that growth in that setting has been minimal. (C3 Opinion of Chief Classification Officer Koehly, Feb. 5, 1979, at 4)
>
> 2. Douglas Wexler's verbal intelligence scores have decreased from a score of 95 in 1968 to 79 in 1974 (P30). (*Id.* at 3)
>
> 3. The records contain a long list of tests and evaluations completed over the years. All psychological evaluations reflect depressed

intelligence scores particularly in the performance areas. None lists a specific and definable central nervous system dysfunction. (*Id.*)

4. With the exception of one consistent island of strength, Douglas Wexler's performance on the Wexler [*sic*] Intelligence Scale for Children is well below average. (*Id.*)

5. There is no "proof that the classification and recommended placement of D.W. [Douglas Wexler] has ever been or is now in classifiable error. The proof is, in fact, to the contrary and in favor of the Board's Child Study Team which carefully and in great detail over a long period of time weighed conflicting medical advice and balanced such advice with its own professional component opinion in the mandated classification procedure." (C.1 Hearing Examiner's Report, March 18, 1977, at 8)

6. For educational purposes Douglas Wexler is educable mentally retarded and in need of special placement for educable mentally retarded pupils. (C.O. Koehly Opinion, *supra*, at 4)

7. An examination of the materials considered by the Child Study Team in 1972 supports the EMR classification. The tests show intelligence in the retarded range, and they are confirmed by the reports of D.W.'s progress at Midland School. (C.5 OAL decision of ALJ Thomas E. Clancy, June 9, 1983, at 5)

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The ALJ found that "the Westfield School District made available a free, appropriate public education to D.W. for the 1972-1973 school year. . . that for whatever reasons, D.W.'s parents did not avail themselves of the opportunity presented, nor did they make any inquiry as to what it was all about. And, they enrolled D.W. at Midland School after having been told twice that Westfield would not pay for the costs involved (*see* Tr. I., p. 13 and Exhibit P-73, item 24) . . . that they voluntarily chose (a) to effect D.W.'s placement at Midland School commencing in September 1972, and (b) to continue his enrollment in private schools through the end of the 1980-1981 school year." Judge Clancy, therefore, found that the plaintiffs were not entitled to reimbursement. Judge Clancy also concluded that "the Westfield Board of Education acted in an appropriate fashion and was duly circumspect, diligent and conscientious at all times. In short, there was nothing irregular or abusive in its action." Decision of June 9, 1983, p. 5.

RELIEF SOUGHT

As aggrieved individuals from the findings and decision of the ALJ, plaintiffs filed this action.

Plaintiffs' complaint seeks relief under federal and state statutes and regulations, including the Education for All Handicapped Children Act, 20 U.S.C. § 1401, *et seq.* (EAHCA); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504); the Civil Rights Act, 42 U.S.C. § 1983; and New Jersey statutes relating to special education, N.J.S.A. 18A: 46-1 *et seq.*, and related decisions.

Plaintiffs seek reimbursement for the educational costs they have incurred resulting from the placement of their son in

private school between 1972 and the present, with interest and attorney's fees.

The EAHCA is the federal statute providing for education for handicapped children. 29 U.S.C. § 794 (§ 504) bars discrimination against handicapped individuals under programs receiving federal financial assistance. N.J.S.A. 18A:46-1, *et seq.*, are the New Jersey statutory provisions concerning classes and facilities for handicapped children.

ISSUES

The initial determination to be made by this court is whether Douglas Wexler's classification in 1972 as "mentally retarded - educable" was proper. A second issue is the availability of a proper program for Douglas Wexler within the Westfield School system.

STANDARD OF REVIEW

Pursuant to 20 U.S.C. § 1415(e)(2), in any action brought under this provision the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant appropriate relief. The "preponderance of evidence" standard has been interpreted by the United States Supreme Court to mean that reviewing courts are not "to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of the IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings."

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Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 206 (1982).

Relying on this language, this standard has been interpreted to require the reviewing court to make an independent determination of the appropriateness of the placement of the student. In doing this, the court must give due weight to the administrative proceedings which have taken place in the New Jersey educational system. *Geis v. Parsippany-Troy Hills,* 589 F. Supp. 269, 271 (D.N.J. 1984).

DISCUSSION

The defendant's decision to reclassify Douglas Wexler as mentally retarded-educable was properly founded in the evidence considered by the Westfield Board of Education's Child Study Team. N.J.A.C. 6:28-1.3 (1978) provides that a Child Study Team has the responsibility to determine pupil eligibility for special education and related services. The team must consist of a school psychologist, a learning disabilities teacher-consultant and a school social worker.

In 1972, when Douglas Wexler was re-evaluated, his I.Q. scores had dropped, even though he had spent four years at the Midland School. In 1968 his I.Q. scores were as follows:

Verbal 95; Performance 69; and Full Scale 81.

In 1972 Douglas Wexler's I.Q. scores were as follows:

Verbal 76; Performance 55; and Full Scale 63.

In 1972, there was no evidence of neurological impairment.

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EEG and skull x-ray results were completely normal. Dr. Ambrose, a neurologist selected by the plaintiffs, found no neurological problem. He reported that Douglas' "Cranial nerves appear to be grossly intact. Pupils are equal at three to four millimeters, external movements are within normal limits - no nystagmus. Visual fields, acuity, and fundi are grossly normal, five, seven through twelve intact. Motor power, sensation, and coordination are all within normal limits. The reflexes are physiologic. Impression: No gross neurological problem.
(2) Speech Impediment. (3) Borderline intelligence level (?)." (P22).

Viewing the drop in Douglas' I.Q. scores after four years at Midland School and the absence of any evidence of neurological impairment, it was reasonable for the Child Study Team to classify Douglas as "mentally retarded-educable."

The educational and medical reports produced in the years after 1972 support this conclusion. In 1973 and 1974 Douglas' IQ was retested. Again his scores were low. EEG and skull x-rays were repeated in 1973 with normal results. The 1974 staffing report indicated that Douglas' progress at the Midland School between 1972 and 1974 had been "extremely limited" and that "progress in reading has been negligible."

Further, the Child Study Team, relying on Douglas' IQ scores and his progress at the Midland School, concluded that Douglas was functioning as a retarded youngster. In fact, Mr. Scagliotta, headmaster of the Midland School during Douglas' enrollment there, testified that Douglas could be considered functionally retarded. (Tr. 13, dated May 4, 1983, before ALJ Clancy)

The defendant asserts that in 1972 the New Jersey State Department of Education had instructed the school to consider

neurological impairment where it was based on EEG results and x-rays. The Department stressed, however, that, if a child is functioning as a retarded youngster, the classification should reflect that, and the team should not focus on possible neurological impairment which is unsupported by EEG and x-ray results as a classified basis. (Defendant's trial brief, pp. 30-31).

Thus, in 1972, the Child Study Team concluded that Douglas Wexler's primary disability was mental retardation and that his strength in the verbal area placed him in the educable category. This conclusion was based on Douglas' IQ scores, his school performance evaluations and the lack of any evidence of neurological impairments.

When Douglas was reclassified in June 1972, his placement recommendation was changed from the Midland School to the Tamaques School. The plaintiffs never investigated the educable-mentally retarded program at the Tamaques School. Douglas and his parents did not visit the EMR class. Both Dr. and Mrs. Wexler testified at the OAL hearing in May 1983 that they did not know the difference between the EMR class at Tamaques and the program offered at the Midland School. Mrs. Wexler testified that she objected to her son being labeled mentally retarded. Dr. Wexler testified that he feared that placing Douglas at the Tamaques School would endanger his son's emotional and physical well-being. These parental responses and concerns are understandable; however, they do not provide record support for the proposition that the Tamaques placement was inappropriate. Thus, there is no evidence that this placement and training would endanger Douglas' health or reflected bad faith on the part of the Westfield Public School System.

The January 1976 re-evaluation by the Child Study Team

and their decision to classify Douglas Wexler as "Multiply handicapped: Primary - Mentally Retarded - Educable; Secondary - Neurologically Impaired" does not suggest that the defendant's 1972 classification was inappropriate. The 1976 classification still focused on Douglas' educability. The recommended placement was in the EMR class at the Tamaques School. The change to "Multiply Handicapped" was in response to the report submitted by Dr. Katcher (P55).

Dr. Katcher recorded findings that he felt were related to Douglas' premature birth and what he felt was "probably dull or very low average intellectual potential." (P55). The Child Study Team states that they felt that Douglas' primary handicap was his "educability." (P58). Thus he was classified as "Multiply Handicapped."

The 1981 reclassification also does not suggest that the 1972 reclassification was improper. In 1981 the Child Study Team reviewed Douglas' status and classified him as "Neurologically or Perceptually Impaired: Perceptually Impaired." (P69). Three factors not present in 1972 influenced this reclassification decision. First, Douglas had matured through adolescence. Secondly, Douglas had benefited from 9 years of training. Thirdly, in 1978 N.J.A.C. 6:28-1.2(5) set forth a new definition for mentally retarded. Mental retardation was defined as

> possessing an intellectual capacity below the average range of intelligence and having deficits in adaptive behavior which adversely affect educational performance and social functioning as distinguished by the following:
>
> i. "Educable" means a level of retardation

> which is characterized by intellectual capacity, as measured by a clinical test of intelligence, within a range encompassing approximately one and one-half to three standard deviations below the mean and a low level of ability to think abstractly . . .

N.J.A.C. 6:28-1.2(5).

Before the 1978 change in the administrative code, classifications were made by the basic Child Study Team "based on data which include the results of a comprehensive physical examination, a psychological examination, an education assessment and a social case study." 2 N.J.R. 4 (d), dated June 4, 1970, p. 3. Pursuant to N.J.A.C. 6:28-2.1, definitions in effect from August 6, 1975, to August 11, 1978, stated that a classification of mentally retarded-educable was appropriate when a child

> 1. Performs on a standardized clinical test of intelligence within a range encompassing approximately 1-1/2 to three standard deviations below the mean;
>
> 2. Gives evidence of limitation to a very low level of ability to think abstractly; and
>
> 3. Gives evidence of less ability to function socially without direction than that displayed by his intellectually-average peers.

Classification of neurologically impaired was appropriate when the "result of an examination . . . shows evidence of specific and definable central nervous system disorder." Definitions are

attached as an appendix to the plaintiff's reply brief.

The 1981 reclassification took into consideration Douglas' adaptive behavior, as required by N.J.A.C. 6:28-1.2(5). In 1972 Douglas was described as an impulsive youngster, obsessed with fighting and having a very limited number of things he can talk about (P21). In 1980 when Dr. Denckla examined Douglas, she found him to exhibit signs of normal social development, welcome features of adolescent rebellion and in a "very happy state at this age of 17." (P68). There is no indication that, even if the Child Study Team had been required to place emphasis on a child's adaptive behavior, Douglas could have been considered adept in his approach to his environment in 1972. Thus, the change in the definitions of mentally retarded-educable between 1972 and 1978 does not affect this court's determination that the defendant's classification of Douglas Wexler as "Multiply Handicapped-Educable" and the recommended placement at the Tamaques School were proper.

Having determined that the 1972 classification was appropriate, a second issue before the court is whether the defendant made available a "free appropriate education" as required by 20 U.S.C. § 1401 *et seq.*

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized

> education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18).

> The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency . . . qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(19).

In 1972 when Douglas' classification was changed to MRE, a specific educational program was developed by Helen Peck of the Child Study Team. *See* Appendix B. In February 1979,

following a decision approving the classification and placement, Dr. Donovan, Director of Special Services, wrote to Dr. and Mrs. Wexler offering to provide Douglas with "an appropriate educational program." (P60).

Following the 1981 reclassification, a staffing was held on February 9, 1981, which was attended by members of the Child Study Team, Dr. and Mrs. Wexler, Dr. Donovan and plaintiff's counsel, Mr. Neibart.

Dr. Wexler signed a permission form to allow implementation of the 1981 IEP. Neither plaintiff, however, inquired into the educational programs offered by the defendant in 1972 or in 1979. Furthermore, the plaintiffs never made any inquiry into comparisons between the program offered at the Midland School and the program proposed for Douglas at the Tamaques School (Tr. 8 of hearing before OAL, dated May 4, 1983).

ALJ Clancy found that the Westfield School District made available a free, appropriate public education to D.W. for the 1972-1973 school year. I agree. Thus plaintiffs are barred from recovering reimbursement for the 1972-1973 school year pursuant to N.J.A.C. 6:28-4.8, which provides that

> If an educationally handicapped pupil has available a free appropriate public education offered by a local school district and the parent chooses to place the pupil in a private school, neither the state nor the local public school district is responsible for the cost of the private school placement.

I also find that the defendant made available a free appropriate public education for the school years between 1973

and 1981 and that the parents voluntarily refused to avail themselves of this offer. Therefore, they are also barred from any recovery of tuition expenses during that period. Thus, having considered the ALJ's resolution of each material issue and having made its own review of the record, this court accepts the ALJ's findings and states, on its own review of the record, that it agrees with those findings.

POST-1982 PERIOD

The defendant asserts that it is not responsible for any expenses relating to Douglas Wexler's education after his graduation from the Maplebrook School in June 1982. The plaintiffs seek reimbursement for tuition and expenses they have incurred in placing their son at the Summit Institute of Collegiate Studies in Israel.

Following Douglas' reclassification in 1981 to Neurologically or Perceptually Impaired: Perceptually Impaired, the Child Study Team met with Dr. and Mrs. Wexler and developed an IEP for Douglas' last ye'ar at the Maplebrook School. This IEP stated, among other provisions:

> XIII. Time in Program
>
> The program will be in effect for the current school year. Upon satisfactory completion of the program for the 1981-82 school year, Douglas will be graduated from the Westfield Public Schools and be given a standard diploma.

(P69).

Appendix E

N.J.A.C. 6:28-2.6(a) states that

> An educationally handicapped pupil who successfully completes his . . . prescribed individualized education program as determined by a basic child study team, shall receive the secondary diploma of the local school district responsible for his . . . education.

During the 1981-1982 school year, the defendant received reports on Douglas' progress at the Maplewood School (R8-10 and 12). Dr. Donovan stated that he had had several telephone conversations with Dr. Wexler during the 1981-1982 school year and that, during these conversations, Dr. Wexler had indicated that he was pleased with his son's progress (R13). Dr. Donovan also stated that he and Dr. Wexler had discussed Douglas' participation in graduation exercises (R13).

All of the reports submitted by the Maplebook School indicated that Douglas was progressing satisfactorily towards completion of his program. The headmaster of the Maplebook School informed the defendant that Douglas had "filled the requirements stated in his I.E.P." (R12).

On May 20, 1981, a final IEP meeting was held to evaluate Douglas' performance at Maplebrook. The meeting was attended by Dr. and Mrs. Wexler; Douglas Wexler, Delores Vito, a teacher; Melinda Burns, phys. ed. teacher; Lynn Thornton, speech therapist; and Lon Adams, administrator (R6). The evaluation of Douglas' progress was labled "Exiting Report" (R6). There is no indication that the Wexlers were dissatisfied with the exiting report or that they felt at that time that Douglas had not satisfactorily completed his IEP for the 1981-1982 school year.

Appendix E

N.J.A.C. 6:28-2.6(a) predicates the award of a diploma on the successful completion of the IEP. None of the plaintiff's actions in the 1981-1982 school year could have been fairly interpreted as a request to have a diploma withheld from their son.

There is no factual basis to support the plaintiffs' contention that the IEP had not been completed to the satisfaction of all parties. I find Douglas was properly graduated and given a diploma from the Westfield Board of Education. As Dr. Donovan had informed Dr. Wexler and his attorney (R13), the defendant's responsibility for Douglas' education was completed. Plaintiffs' request for reimbursement relating to Douglas' education in Israel must be denied.

ATTORNEY'S FEES

Plaintiffs seek attorney's fees in connection with the administrative proceedings and these proceedings. The EAHCA does not itself provide for an allowance of attorney's fees to a prevailing party. *See Smith v. Robinson,* 104 S. Ct. 3457 (1984); and *Irving Ind. School Dist. v. Tatro,* 104 S. Ct. 3371 (1984); *Rollison v. Biggs,* 567 F. Supp. 965, 967-68 (D.N.J. 1983). In addition, 42 U.S.C. § 1988 may not be used to recover attorney's fees where the exclusive underlying substantive remedy is under the more specific provisions of the EAHCA. *Hymes v. Hartnett County Bd. of Ed.,* 664 F. 2d 410 (4th Cir. 1981). Plaintiffs would not be entitled to attorney's fees based on their claims under Section 504. *Rollison v. Biggs, supra,* at 968. In light of the above, plaintiffs have not prevailed and are not entitled to attorney's fees.

DOUGLAS' CURRENT PLACEMENT IN 1972

Plaintiffs allege that they are entitled to reimbursement for

their expenses relating to Douglas' enrollment at the Midland School because that was Douglas' current placement and they had a right to have him remain there until a hearing was held and a final order entered disposing of their challenge to the defendant's proposed change in classification and placement. The plaintiffs rely on 20 U.S.C. § 1415(e)(3) which provides that "[d]uring the pendency of any proceedings conducted pursuant to this section . . . the child shall remain in the then current educational placement . . ." This provision did not become effective until October 1, 1977.

Plaintiffs also rely on N.J.A.C. 6:28-1.9 which sets forth the due process procedures to be followed. Section 6:28-1.9(e) provides that "parental consent shall be obtained before a school district may . . . make initial placement of a pupil in a program providing special education . . . ." This provision did not become effective until 1978. The provision in N.J.A.C. 6:28-1.9(e) in effect from August 6, 1975, to August 11, 1978, did not contain any provision for maintaining a child in his then current placement. From August 6, 1975 to August 11, 1978, N.J.A.C. 6:28-1.10 provided that "Parents who challenge the findings of the child study team have the right to request an independent educational evaluation of their child from the Branch of Special Education and Pupil Personnel Services, State Department of Education. The Department of Education shall provide, without cost to the parent, all necessary professional evaluation services for this purpose."

Defendant asserts that Douglas' placement in 1972 was the Tamaques School, not the Midland School.

I find that it was reasonable for the defendant to consider Douglas' then current placement to be the Tamaques School. It

was also reasonable for the defendant to have viewed the Wexler's decision not to investigate or enroll their son in the program the defendant offered their son at the Tamaques School as a withdrawal of their son from the Westfield Public School System. Furthermore, in light of the fact that there was no state requirement between 1972 and 1978 for the defendant to maintain a student in his then current placement, the defendant may not be held liable for expenses the plaintiff incurred as a result of enrolling their son in the Midland School on their own behalf. The defendant's actions in considering Douglas' placement to be the Tamaques School and refusing to reimburse the plaintiffs for expenses incurred in Douglas' enrollment at the Midland School did not deprive the plaintiffs of due process under the EAHCA or under New Jersey law.

ALJ'S FACTFINDING

The plaintiff asserts that the decision rendered by ALJ Clancy on June 6, 1983, violated plaintiffs' procedural due process rights because it does not contain findings of fact or conclusions of law. Plaintiffs base this argument on their conclusion that the "opinion consists of a 'chronological commentary' lifted verbatim from defendant's post-hearing brief." Plaintiffs reply brief, p. 5.

This assertion is without merit. Judge Clancy's opinion clearly sets forth his findings of fact and conclusions of law. Accordingly, plaintiff is not entitled to relief on this basis.

CONCLUSION

Based on the foregoing, the complaint will be dismissed and judgment will be entered in favor of the defendant.

Appendix E

s/ Frederick B. Lacey
FREDERICK B. LACEY
UNITED STATES DISTRICT
JUDGE

Dated: November 27, 1984

APPENDIX F—JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, ENTERED FEBRUARY 19, 1986, AND ISSUED ON MARCH 26, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5886

WEYMOUR WEXLER and DAISY WEXLER, individually and on behalf of their child, DOUGLAS WEXLER,

Appellants

vs.

WESTFIELD BOARD OF EDUCATION

(D.C. Civil No. 83-2745-L)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, WEIS, and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel November 4, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 29, 1984, be, and the same is hereby

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affirmed. Costs taxed against the appellants.

ATTEST:

s/ Sally Mvros
Clerk

February 19, 1986

Certified as a true copy and issued in lieu of a formal mandate on March 26, 1986.

Test: s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit

APPENDIX G—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED MARCH 18, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5886

SEYMOUR WEXLER and DAISY WEXLER, Individually and on behalf of their child, DOUGLAS WEXLER,

Appellants

v.

WESTFIELD BOARD OF EDUCATION,

Appellee

Appeal from the United States District Court for the District of New Jersey
(Civ. 83-2745-L)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and ROSENN, *Circuit Judges*

Appendix G

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

s/ Seitz
Circuit Judge

DATED: MARCH 18, 1986

APPENDIX H—DEFINITIONS, 20 U.S.C. § 1401(16) through (19)

20 U.S.C. § 1401:

"§ 1401. **Definitions**

As used in this chapter—

* * *

(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under

public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a represesntative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved."

APPENDIX I—ELIGIBILITY REQUIREMENTS, 20 U.S.C. § 1412(1) and (6)

20 U.S.C. § 1412:

"§ 1412. **Eligibility requirements**

In order to qualify for assistance under this sub-chapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

* * *

(6) The State educational agency shall be responsible for assurance that the requirements of this sub-chapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State education agency and shall meet education standards of the State education agency."

APPENDIX J—PROCEDURAL SAFEGUARDS, 20 U.S.C. § 1415(a) THORUGH (e)(4)

20 U.S.C. § 1415:

Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of

the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or
(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section, and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

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(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirement sof this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with

special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United

States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.